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# The California Public Records Act: The Public's Right of Access to Governmental Information

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# The California Public Records Act: The Public's Right Of Access To Governmental Information

The political history of the United States has been characterized by an ever-increasing expansion of the size and power of government. Countless departments, commissions, boards, bureaus, offices, and agencies have been created by the federal, state, and local governments to carry out the wide array of governmental functions. The result of this phenomenon has been the creation of an immense bureaucracy which accumulates enormous quantities of records and documents. Availability of the information contained in government files may be of two-fold importance to the citizenry. First, the records may contain public information which, if disclosed, would influence the electorate in the exercise of its political control over the government; second, the information may aid the private individual in conducting his personal affairs.

The public's right to inspect governmental records has long been recognized, but this right has never been considered absolute.[1] By judicial fiat, California adopted the common law rule which permitted an individual to inspect public records only if he had a beneficial interest therein.[2] California eventually abandoned this requirement and extended the right of inspection to anyone who did not intend to use the information for an "unlawful or scandalous purpose."[3] Despite the seemingly expansive purview of the latter rule, the precise scope of the public's right to inspect was obfuscated by judicial decisions which narrowly construed the term "public record"[4] and by legislative enactments that prohibited the inspection of certain documents.[5] This confusion was compounded by the often conflicting interpretive opinions

1. *See* Herbert v. Ashburner, 95 Eng. Rpts. 628 (1750).
2. Colnon v. Orr, 71 Cal. 43, 11 P. 814 (1886). At common law, the usual "beneficial interest" was maintaining or defending a lawsuit to which the requested public records were pertinent. *See* Nowack v. Fuller, 243 Mich. 200, 205-06, 219 N.W. 749, 751 (1928).
3. Harrison v. Powers, 19 Cal. App. 762, 763, 127 P. 818, 818 (1912).
4. *See, e.g.*, Coldwell v. Bd. of Pub. Works, 187 Cal. 510, 202 P. 879 (1921); Mushet v. Dep't of Pub. Serv., 35 Cal. App. 630, 170 P. 630 (1917).
5. For an in-depth discussion of pre-Records Act history, see Comment, *Access to Governmental Information in California*, 54 CAL. L. REV. 1650, 1665-80 (1966); Comment, *Inspection of Public Records Under California Law*, 50 CAL. L. REV. 79 (1962).

promulgated by the Legislative Counsel, the Attorney General, local county counsel, and city attorneys.[6]

In 1968 the California Public Records Act[7] (hereinafter referred to as the Records Act or the Act) was enacted in an attempt to clarify the scope of the public's right to inspect public records.[8] The Act specifies

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6. LEGISLATIVE COUNSEL'S OPINION, FINAL REPORT OF CALIFORNIA STATE ASSEMBLY STATEWIDE INFORMATION POLICY COMMITTEE 7, vol. 1, APPENDIX TO JOURNAL OF THE ASSEMBLY, Reg. Sess. 1970 [hereinafter cited as ASSEMBLY INFORMATION COMMITTEE].

7. Cal. Gov't Code §§6250-6260, *enacted* CAL. STATS. 1968, c. 1473, §39, at 2946. For a general discussion of the history of the enactment of the Records Act and an overview of its exemptive provisions, see Schaffer, *A Look at the California Records Act and its Exemptions*, 4 GOLDEN GATE L. REV. 203 (1973-74).

8. CAL. GOV'T CODE §6250:

> In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.

GOV'T CODE §6251:

> This chapter shall be known and may be cited as the California Public Records Act.

CAL. GOV'T CODE §6252:

> As used in this chapter:
>
> (a) "State agency" means every state office, officer, department, division, bureau, board, and commission or other state agency, except those agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution.
>
> (b) "Local agency" includes a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof; or other local public agency.
>
> (c) "Person" includes any natural person, corporation, partnership, firm, or association.
>
> (d) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. "Public records" in the custody of or maintained by the Governor's office means any writing prepared on or after January 6, 1975.
>
> (e) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents.

CAL. GOV'T CODE §6253:

> (a) Public records are open to inspection at all times during the office hours of the state or local agency and every citizen has a right to inspect any public record, except as hereafter provided. Every agency may adopt regulations stating the procedures to be followed when making its records available in accordance with this section.
>
> The following state and local bodies shall establish written guidelines for accessibility of records. A copy of these guidelines shall be posted in a conspicuous public place at the offices of such bodies, and a copy of such guidelines shall be available upon request free of charge to any person requesting that body's records:
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> Department of Motor Vehicles
> Department of Consumer Affairs
> Department of Transportation
> Department of Real Estate
> Department of Corrections
> Department of the Youth Authority
> Department of Justice
> Department of Insurance

that any public record in the possession of a state or local agency must

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Department of Corporations
Secretary of State
State Air Resources Board
Department of Water Resources
Department of Parks and Recreation
San Francisco Bay Conservation and Development Commission
State Department of Health
Employment Development Department
Department of Benefit Payments
Public Employees' Retirement System
Teachers' Retirement Board
Department of Industrial Relations
Department of General Services
Department of Veterans Affairs
Public Utilities Commission
California Coastal Zone Conservation Commission
All regional coastal zone conservation commissions
State Water Quality Control Board
San Francisco Bay Area Rapid Transit District
All regional water quality control boards
Los Angeles County Air Pollution Control District
Bay Area Air Pollution Control District
Golden Gate Bridge, Highway and Transportation District.

(b) Guidelines and regulations adopted pursuant to this section shall be consistent with all other sections of this chapter and shall reflect the intention of the Legislature to make such records accessible to the public.

CAL. GOV'T CODE §6253.5:

Notwithstanding the provisions of Sections 6252 and 6253, statewide, county, city, and district initiative, referendum, and recall petitions and all memoranda prepared by the county clerks in the examination of such petitions indicating which registered voters have signed particular petitions shall not be deemed to be public records and shall not be open to inspection except by the public officer or public employees who have the duty of receiving, examining or preserving such petitions or who are responsible for the preparation of such memoranda.

CAL. GOV'T CODE §6254:

Except as provided in Section 6254.7, nothing in this chapter shall be construed to require disclosure of records that are:

(a) Preliminary drafts, notes, or interagency or intra-agency memoranda which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure;

(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810) of Title 1 of the Government Code, until such litigation or claim has been finally adjudicated or otherwise settled;

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy;

(d) Contained in or related to:

(1) Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies;

(2) Examination, operating, or condition reports prepared by, on behalf of, or for the use of any state agency referred to in subdivision (1);

(3) Preliminary drafts, notes, or interagency or intra-agency communications prepared by, on behalf of, or for the use of any state agency referred to in subdivision (1); or

(4) Information received in confidence by any state agency referred to in subdivision (1).

(e) Geological and geophysical data, plant production data and similar information relating to utility systems development, or market or crop reports, which are obtained in confidence from any person;

(f) Records of complaints to or investigations conducted by, or records of

intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes;

(g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination;

(h) The contents of real estate appraisals, engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts, until such time as all of the property has been acquired or all of the contract agreement obtained, provided, however, the law of eminent domain shall not be affected by this provision;

(i) Information required from any taxpayer in connection with the collection of local taxes which is received in confidence and the disclosure of the information to other persons would result in unfair competitive disadvantage to the person supplying such information;

(j) Library and museum materials made or acquired and presented solely for reference or exhibition purposes;

(k) Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege;

(l) Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's legal affairs secretary, provided public records shall not be transferred to the custody of the Governor's legal affairs secretary to evade the disclosure provisions of this chapter;

(m) In the custody or maintained by the Legislative Counsel;

(n) Statements of personal worth or personal financial data required by a licensing agency and filed by an applicant with such licensing agency to establish his personal qualification for the license, certificate, or permit applied for; and

Nothing in this section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.

CAL. GOV'T CODE §6254.7:

(a) All information, analyses, plans, or specifications that disclose the nature, extent, quantity, or degree of air contaminants or other pollution which any article, machine, equipment, or other contrivance will produce, which any air pollution control district or any other state or local agency or district requires any applicant to provide before such applicant builds, erects, alters, replaces, operates, sells, rents, or uses such article, machine, equipment, or other contrivance, are public records.

(b) All air or other pollution monitoring data, including data compiled from stationary sources, are public records.

(c) All records of notices and orders directed to the owner of any building of violations of housing or building codes, ordinances, statutes, or regulations which constitute violations of standards provided in Section 1941.1 of the Civil Code, and records of subsequent action with respect to such notices and orders, are public records.

(d) Except as otherwise provided in subdivision (e), trade secrets are not public records under this section. "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.

(e) Notwithstanding any other provision of law, all air pollution emission data, including those emission data which constitute trade secrets as defined in subdivision (d), are public records. Data used to calculate emission data are not emission data for the purposes of this subdivision and data which constitute trade secrets and which are used to calculate emission data are not public records.

CAL. GOV'T CODE §6254.8:

Every employment contract between a state or local agency and any public

be disclosed to any citizen unless an exemption applies.[9] There are only two means by which a record may be exempted from required disclosure. First, the record may fall within one or more of fourteen specific exemptions enumerated by the Act.[10] In general, these exemptions are

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official or public employee is a public record which is not subject to the provisions of Sections 6254 and 6255.

CAL. GOV'T CODE §6255:

The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.

CAL. GOV'T CODE §6256:

Any person may receive a copy of any identifiable public record or copy thereof. Upon request, an exact copy shall be provided unless impracticable to do so. Computer data shall be provided in a form determined by the agency.

CAL. GOV'T CODE §6257:

A request for a copy of an identifiable public record or information produced therefrom, or a certified copy of such record, shall be accompanied by payment of a reasonable fee or deposit established by the state or local agency, provided such fee shall not exceed ten cents ($0.10) per page or the prescribed statutory fee, where applicable.

CAL. GOV'T CODE §6258:

Any person may institute proceedings for injunctive or declarative relief in any court of competent jurisdiction to enforce his right to inspect or to receive a copy of any public record or class of public records under this chapter. The times for responsive pleadings and for hearings in such proceedings shall be set by the judge of the court with the object of securing a decision as to such matters at the earliest possible time.

CAL. GOV'T CODE §6259:

Whenever it is made to appear by verified petition to the superior court of the county where the records or some part thereof are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why he should not do so. The court shall decide the case after examining the record in camera, if permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the parties and such oral argument and additional evidence as the court may allow.

If the court finds that the public official's decision to refuse disclosure is not justified under the provisions of Section 6254 or 6255, he shall order the public official to make the record public. If the judge determines that the public official was justified in refusing to make the record public, he shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure. Any person who fails to obey the order of the court shall be cited to show cause why he is not in contempt of court. The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. Such costs and fees shall be paid by the public agency of which the public official is a member or employee and shall not become a personal liability of the public official. If the court finds that the plaintiff's case is clearly frivolous, it shall award court costs and reasonable attorney fees to the public agency.

CAL. GOV'T CODE §6260:

The provisions of this chapter shall not be deemed in any manner to affect the status of judicial records as it existed immediately prior to the effective date of this section, nor to affect the rights of litigants, including parties to administrative proceedings, under the laws of discovery of this state.

CAL. GOV'T CODE §6261:

Notwithstanding Section 6252, an itemized statement of the total expenditures and disbursement of any agency provided for in Article VI of the California Constitution shall be open for inspection.

9. CAL. GOV'T CODE §6253.

10. CAL. GOV'T CODE §6254.

designed either to protect the privacy of persons who have disclosed confidential information to the government[11] or to preserve state secrets,[12] agency deliberative processes,[13] or confidential sources of information.[14] Second, a record may be withheld from the public even though it does not fall within a specifically enumerated exemption, if the government can demonstrate that public policy necessitates nondisclosure of the record.[15]

This comment analyzes the scope and operation of the Act's disclosure, exemptive, and enforcement provisions. The emphasis of the analysis, however, will be upon the statutory exceptions to the Act's general policy of disclosure. In order to accomplish this analysis, the reader will be referred to the relatively small number of California cases which have interpreted some of the Act's provisions as well as to the principles of the common law dealing with public records, and the federal case law interpreting analgous provisions of the federal Freedom of Information Act[16] (hereinafter referred to as the FOIA). It is hoped that this presentation will serve as a practical aid to both the layman and the practitioner who seek access to governmental records in California.

## Disclosure Provisions

The Records Act epitomizes another attempt by the California Legislature to reconcile the conflicts between the public's need to be informed of the actions of government and the individual's need to maintain his privacy. The accommodation of these conflicting interests has become an increasingly difficult problem for the legislature in recent years. On the one hand, the voting public and the legislature have manifested their increasing concern with the "right to know"[17] by adopting such laws as Proposition 9,[18] the Ralph M. Brown Act,[19] and the Governmental

11. *See* Cal. Gov't Code §§6254(c), 6254(e), 6254(i), 6254(n).
12. *See* Cal. Gov't Code §§6254(b), 6254(f), 6254(k).
13. *See* Cal. Gov't Code §6254(a).
14. *See* Cal. Gov't Code §§6254(f), 6254(k).
15. Cal. Gov't Code §6255.
16. 5 U.S.C. §552 (1968), *as amended*, 5 U.S.C. §552 (1975) [the FOIA was extensively amended in early 1975; these amendments do not affect the analysis of the federal case law used in this comment]. This comment will only attempt to "borrow" some of the federal case law analysis. It is not intended to be read as a comparison of the FOIA and the Records Act.
17. "Right to know" is the nomenclature assigned by the California Legislature to legislation designed to expose governmental activities to the public. *See* Assembly Interim Committee on Government Organization, The Right To Know, vol. 12, no. 10 (1965).
18. Cal. Gov't Code §81000 *et seq.* [entitled the Political Reform Act of 1974].
19. Cal. Gov't Code §54950 *et seq.* Section 54953 of the Brown Act declares that "[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend . . . ."

Conflict of Interests Act.[20] On the other hand, the California Supreme Court has declared that the right to privacy is a fundamental right,[21] and its holding is now embodied in the California Constitution.[22] It is clear that neither of these interests is so fundamental that it must be given priority over the other in all situations.[23] Thus, when enacting "right to know" legislation, the legislature must preserve the right to privacy to the fullest extent possible while simultaneously defining the instances in which the right to know will be deemed paramount.[24]

The California Legislature demonstrated its awareness of this task when it enacted the Records Act. Section 6250 of the Act states:

> In enacting this chapter, the Legislature, *mindful of the right of individuals to privacy*, finds and declares that access to information concerning the conduct of the people's business is a *fundamental and necessary right of every person* in this state.[25]

This declaration concisely describes the interplay between the public's right to inspect public documents and many of the Act's exemptive provisions. The legislature has attempted to accommodate both the right to know and the right to privacy by creating certain exemptions that operate to prevent disclosure of information which, if revealed, would constitute an unwarranted invasion of an individual's right to privacy.[26]

In order to promote the statutorily granted "fundamental right" of access to governmental information, the Records Act provides that all records of "state"[27] and "local"[28] agencies are "public records." Further-

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20. CAL. GOV'T CODE §3600 *et seq.*

21. City of Carmel-By-The-Sea v. Young, 2 Cal. 3d 259, 268, 466 P.2d 225, 232, 85 Cal. Rptr. 1, 8 (1970).

22. CAL. CONST. art. I, §1, *adopted* May 7, 1879, *amended* November 7, 1972.

23. *See* City of Carmel-By-The-Sea v. Young, 2 Cal. 3d 259, 269, 466 P.2d 225, 232, 85 Cal. Rptr. 1, 8 (1970); Kapellas v. Kofman, 1 Cal. 3d 20, 36, 459 P.2d 912, 922, 81 Cal. Rptr. 360, 370 (1969).

24. At least one California case has indicated that the legislature may balance the right to know and the right to privacy and demarcate the areas of disclosure and nondisclosure of governmental information. Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 655, 117 Cal. Rptr. 106, 112 (1974).

25. CAL. GOV'T CODE §6250 (emphasis added).

26. In *Black Panther Party v. Kehoe* the plaintiff contended that the right to know is derived from the first amendment and is thus immune from the statutory exemptions enumerated by the Records Act. Although no judicial decisions have yet completely agreed with this proposition, the *Kehoe* court did state that "[t]here is an undoubted connection between First Amendment freedoms and access to government files, especially those which record or illuminate official action." Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 654, 117 Cal. Rptr. 106, 112. A number of writers have suggested constitutional theories for the right to know: Hennings, *Constitutional Law: The People's Right to Know*, 45 A.B.A.J. 667 (1959); Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1 (1957); Comment, *Access to Official Information: A Neglected Constitutional Right*, 27 IND. L. REV. 209 (1952).

27. Pursuant to Government Code section 6252(a), a "state agency" encompasses, with certain exceptions, *every* state office, officer, department, division, bureau, board, and commission or other state agency. Excepted from the definition are both houses of the legislature, legislative committees established by either house, and all components

more, the Act defines a "public record" in extremely broad terms so as to mitigate the problems encountered with the common law's restrictive and technical definition of a public record.[20] Under Government Code Section 6252(d), a "public record" is any "writing" which is related to the public's business, and which is "prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." The term "writing" is broadly defined so as to encompass every possible form of record-keeping technique, including any new method which may be developed in the future.[30] By use of the phrase "retained by any state or local agency" the legislature apparently intended to include any record, whether the original or a copy, which is held by any agency on a continuing basis.[31]

Since the enactment of the Act in 1968, the legislature has added several provisions which specifically include or exclude certain records from the definition of a "public record." For example, the employment contracts between state and local agencies and public officials or employees are public records under section 6254.8. In addition, section 6254.7 declares that notices and orders to building owners concerning violations of the housing and building laws, and documents pertaining to actions taken pursuant to those notices and orders, are public records. Section 6254.7 also declares that documents embodying data on pollution are public records. On the other hand, specified trade secrets relating to that pollution data,[32] and petitions concerning statewide,

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of the judicial system, the Judicial Council, the Commissions on Judicial Appointments and Judicial Qualifications, and the State Bar of California. However, the legislature recently enacted the Legislative Open Records Act (CAL. GOV'T CODE §9070 *et seq., enacted* CAL. STATS. 1975, c. 1246, §1, at —.), which contains provisions for making the legislature's records available to the public. This new act's provisions are substantially the same as those contained in the Records Act.

In contrast, the records of the governor and the legislative counsel are public records under the Act. Before 1976, the governor's records were exempt from disclosure. *See* CAL. GOV'T CODE §6254(1), *enacted* CAL. STATS. 1968, c. 1478, §39, at 2946. Presently, under the latest amended version of the Act, there is only a limited exemption for the records of the governor and his legal affairs secretary. *See* CAL. GOV'T CODE §6254 (1), *as amended,* CAL. STATS. 1975, c. 1246, §3, at —. However, only those records which are prepared on or after January 6, 1975 are subject to disclosure under the Act. *See* CAL. GOV'T CODE §6252(d), *as amended,* CAL. STATS. 1975, c. 1246, §2, at —. On the other hand, the records of the legislative counsel are exempt from disclosure. CAL. GOV'T CODE §6254(m).

The California Attorney General has opined that the University of California's records are also "public records" under Government Code section 6252(a). 58 OPS. ATT'Y GEN. 84 (1975).

28. A "local agency" includes any "county; chartered and non-chartered city; city and county; school district; municipal corporation; district; political subdivision; or any board, commission, or agency thereof; or other local public agency." CAL. GOV'T CODE §6252(b).

29. See text accompanying notes 4-5 *supra.*

30. *See* CAL. GOV'T CODE §6252(e).

31. See text preceding notes 190 *infra.*

32. CAL. GOV'T CODE §6254.7(d)-(e).

county, city, and district initiatives, referenda, and recalls are *not* public records.[33] The import of the provisions that exclude certain information from the definition of a "public record" is that these records are not subject to any of the Act's provisions.

The most significant of the Acts's disclosure provisions is Government Code Section 6253, which provides that every "citizen"[34] has the right to inspect and make copies of public records during the office hours of state and local agencies unless the particular record is exempt from disclosure. This policy represents a significant departure from the common law rule which limited the right of disclosure to those who had a beneficial interest in the particular record.[35] The Act requires no subjective examination of an individual's motive for requesting inspection of a record;[36] therefore, the existence of an ulterior motive for seeking disclosure of a record, or the lack of any particular motive whatsoever, should never preclude a requesting party from gaining access to a public record.[37] The Records Act only authorizes an objective determination as to whether the character or content of the record in question requires that it be open for public inspection.[38]

Although section 6253 grants the right to inspect and make copies, a citizen does not have the unfettered right to inspect public records at any time and in any manner. Under section 6253(a) the agencies are authorized to adopt regulations governing the procedures by which records are to be made available to the public.[39] The precise scope of the agencies' powers to promulgate these regulations, however, has not yet been defined by the judiciary. In a pre-Act decision, *Bruce v. Gregory*,[40]

33. CAL. GOV'T CODE §6253.5.

34. It is interesting to note that while the legislature gives every "person" the fundamental right of access to public records, CAL. GOV'T CODE §6250, only "citizens" have the right to inspect during the office hours, CAL. GOV'T CODE §6253(a). A literal reading of section 6253(a) would seem to exclude corporations, which are not considered "citizens" for constitutional purposes. Grosjean v. American Press Co., 297 U.S. 233 (1936). However, since the legislature has specifically included corporations and other business associations within the definition of "person" [section 6252(c)] and has given every "person" the right of access to public records [section 6250], there would seem to be no logical foundation for distinguishing between "person" and "citizen." Thus the discrepancy would seem to be a case of careless draftsmanship.

35. See text accompanying notes 1-3 *supra*.

36. *Cf.* K. DAVIS, ADMINISTRATIVE LAW TREATISE §3A.4, at 120 (1970 Supp.) [hereinafter cited as K. DAVIS]. *But cf.* Wine Hobby, USA, Inc. v. Bureau of Alcohol, Tobacco & Firearms, 502 F.2d 133 (3rd Cir. 1974); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971), *stay denied*, 404 U.S. 1204 (1971); see text accompanying notes 154-162 *infra*.

37. See text accompanying notes 163-166 *infra*.

38. *Cf.* K. DAVIS, *supra* note 36, §3A.4 (1970 Supp.).

39. Government Code Section 6253(a) requires 31 state and local agencies to establish written guidelines for accessibility of public records. A copy of these guidelines must be conspicuously posted and be available free of charge to any person requesting the agency's records. In addition, all other state and local agencies are authorized to adopt such procedures.

40. 65 Cal. 2d 666, 423 P.2d 193, 56 Cal. Rptr. 265 (1967).

the California Supreme Court did delineate the scope of an agency's power to promulgate regulations pursuant to a statute containing language which was almost identical to that used in Government Code Section 6253(a).[41] In *Bruce* the supreme court stated that the public's right to inspect public records is subject to an implied rule of reason.[42] Accordingly, it held that an agency could devise procedures regulating the public's access to records if such regulations were *necessary* to promote one of the following goals: (1) to protect the records from theft, mutilation, or accidental damage; (2) to prevent interference with the orderly functioning of the office and its employees; or (3) to prevent chaos in the records archives.[43] If *Bruce* is still valid authority, it is apparent that the agencies may only adopt regulations pursuant to Government Code Section 6253(a) which are strictly necessary to accomplish any one of the legitimate state goals set forth in the *Bruce* decision.[44]

Coextensive with the right to inspect public records is the right to receive copies of those records.[45] Pursuant to section 6256 any person has the right to receive a copy[46] of any *identifiable* public record. Federal case law interpreting the FOIA has held that an "identifiable" record is one that is reasonably described so as to enable an agency employee to locate the requested information.[47] If the California courts were to accept this federal test, once it is determined that a record is identifiable, the language of section 6256 would seem to provide any person with the absolute right to receive a copy.

Thus far, only one California appellate decision has concerned itself

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41. The statute construed by the *Bruce* court provided that public records "are at all times during office hours open to inspection . . . ." Former CAL. GOV'T CODE §1227, *repealed*, CAL. STATS. 1968, c. 1473, §38, at 2945. Government Code Section 6253(a), which was enacted to replace former section 1227, provides, in pertinent part, that "[p]ublic records are open to inspection at all times during the office hours of the state or local agency . . . ."

42. 65 Cal. 2d 666, 676, 423 P.2d 193, 199, 56 Cal. Rptr. 265, 271 (1967).

43. *Id.* at 676, 423 P.2d at 199, 56 Cal. Rptr. at 271.

44. *Id.* at 678, 423 P.2d at 201, 56 Cal. Rptr. at 273.

The *Bruce* decision has been cited with approval by a lower appellate court in Rosenthal v. Hansen, 34 Cal. App. 3d 754, 110 Cal. Rptr. 257 (1973) in relation to an agency's regulatory authority under Government Code section 6253(a). See text accompanying notes 48-56 *infra*. Therefore, it would seem that the rules delineated in *Bruce* are still viable today.

45. Rosenthal v. Hansen, 34 Cal. App. 3d 754, 759, 110 Cal. Rptr. 257, 260 (1973).

46. The right to receive copies of public records is subject to the tender of a reasonable fee or deposit for copying costs, provided such fee does not exceed ten cents per page or the applicable prescribed statutory fee. CAL. GOV'T CODE §6257, *as amended*, CAL. STATS. 1975, c. 1246, §8, at —.

47. *E.g.*, Nat'l Cable Television Ass'n v. FTC, 479 F.2d 183, 190 (D.C. Cir. 1973); Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 824 (1970).

with this issue. In *Rosenthal v. Hansen*[48] it was held that an individual's right to an agency-made copy of a record, under the rationale of *Bruce*, is subject to an implied rule of reason.[49] The plaintiff in *Rosenthal* had requested a copy of the entire seven volume Benefit Determination Guide, its present amendments, and the Unemployment Insurance Notices of the California Department of Human Resources Development. He did not limit his request to specific groups of records within that general category. The court held that an agency was required to prepare and furnish copies pursuant to "specific" requests, but not as to "general" requests.[50] Unfortunately, the court did not elucidate its meaning of these two types of requests. In formulating its decision the court seemed to be influenced by the volume of the requested material, noting that such "general" requests could result in the agencies entering into the printing business.[51] It could be argued that a "general" request is one whereby the plaintiff requests *all* the material in a large category of records so that he may examine them to see which ones contain information he actually needs. If such requests were honored, the requesting party could evade the requirement of having to "identify" the records he wanted; he would merely have to request all the records of a given category.[52] It is important to note, however, that the *Rosenthal* court only held that the *agency* need not *furnish* the copies in compliance with "general" requests.[53] An individual may still inspect and make his own copies of the records, so long as he can do so without interfering with the efficient operation of the office.[54]

Assuming that a requested record is "identifiable," the *Rosenthal* decision held that an individual who makes a "specific" request for a record is entitled to an agency-made copy.[55] Government Code Section 6256 specifies that the individual must be provided with an *exact* copy unless it is impracticable for the agency to do so. However, the fact that it is impracticable to make an exact copy does not preclude the person from obtaining any copy whatsoever; he is still entitled to some type of copy of the record.[56] In this way, an effective accommodation between

48. 34 Cal. App. 3d 754, 110 Cal. Rptr. 257 (1973).
49. *Id.* at 761, 110 Cal. Rptr. at 262.
50. *Id.*
51. *Id.* at 760, 110 Cal. Rptr. at 261.
52. *See* Irons v. Schuyler, 465 F.2d 608 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1076 (1972), affirming the Patent Office's denial of a demand for all unpublished manuscripts. The court held that the request for records must contain greater descriptive information.
53. 34 Cal. App. 3d 754, 761, 110 Cal. Rptr. 257, 262 (1973).
54. *Id.*
55. *Id.*
56. *Id.* at 759, 110 Cal. Rptr. at 261.

the "right to know" and the legitimate need for the agencies to operate efficiently is achieved.

## THE EXEMPTIONS

The Records Act does not require that *all* public records in the possession of state and local agencies be open for public inspection. Under Government Code Section 6254, the legislature has created fourteen specific categories of exempt public records. The legislature has also created a general exemption by which any record may be withheld from the public if the agency can demonstrate that "on the facts of the particular case the *public interest* served by not making the record public *clearly outweighs* the *public interest* served by disclosure of the record."[57] In all cases, however, the burden is on the government to assert and prove the availability of an exemption.[58] In the absence of such an assertion all public records must be made available for public inspection.

It is readily apparent from the previous analysis of the Act's disclosure provisions that the judicial interpretation of the exemptive sections will largely determine the extent of the public's right to inspect and receive copies of public records. The federal courts have universally accepted the proposition that the FOIA creates a liberal disclosure requirement, limited only by specific exemptions which are narrowly construed.[59] In narrowly construing some of the FOIA exemptions, however, these courts have actually created additional judicially-imposed limitations on disclosure.[60] Unquestionably, some of these judicially-created limitations derive from the courts' difficulties in interpreting some of the FOIA's rather general and poorly drafted provisions.[61] The Records Act, on the other hand, seems to be more carefully drafted and should present fewer obstacles to California courts charged with the task of interpreting its provisions.[62] The Act contains no provision which directs the courts to liberally construe the disclosure provisions or to narrowly construe the exemptions.[63] One California case, *Black Panther*

57. CAL. GOV'T CODE §6255 (emphasis added).
58. *Id.*
59. *E.g.*, Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir. 1970).
60. *See* Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261, 1274 (1970) (refers to these limitations as "functional limitations.").
61. *See* Epstein v. Resor, 421 F.2d 930, 932 (9th Cir. 1970); Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 807-09 (1967).
62. "The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law." People v. Super. Ct., 70 Cal. 2d 123, 132, 449 P.2d 230, 237, 74 Cal. Rptr. 294, 301 (1969).
63. It would seem that if the legislature wished the courts to construe the Records Act in a particular manner, it could easily have directed them to do so. For example,

*Party v. Kehoe,*[64] has explictly rejected the federal policy of strict construction of the exemptions, stating that "[t]he task is to construe the exemptions neither broadly nor narrowly, but according to the court's understanding of the legislature's 'real accord.' "[65]

In ascertaining the legislature's "real accord," Government Code Section 6250 is pertinent because it evidences the legislature's policy as one of disclosure while being mindful of individual privacy. The legislature's express concern for the right to privacy, by itself, seems to militate against strict construction of the exemptions. However, there are at least two other factors which lend additional support to this view. First, in many instances, a citizen may be *required* to disclose personal data to the government. For example, many regulatory, licensing, and law enforcement agencies require citizens to divulge certain information that might otherwise be kept private. A record containing such information should only be disclosed to the public when necessary to promote legitimate public inquiries into official conduct.[66] Disclosure of personal information in other circumstances would arguably go beyond the bounds of propriety and reason and therefore should not be permitted.[67] Secondly, the private individual whose personal data is contained within governmental files must rely upon the legislature to provide an exemption for that type of record. Since the Act makes no provision allowing the individual to enjoin public disclosure, a judicially-adopted policy of narrowly construing the exemptions might be contrary to legislative intent and could impose an uncalled-for abridgement of individual privacy. Hence, the following analysis will focus upon the apparent legislative intent behind the creation of the Act's exemptions not upon the interpretation that will most narrowly limit the scope of that particular exemption.

The discussion of the Act's exemptions has been organized so as to emphasize the various types of exemptions, the purposes for their enactment, and their interrelationship. The more general "public policy" exemption is dealt with at the outset because it seems to reflect the public interests that were considered by the legislature when it drafted

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in the Governmental Conflict of Interests Act, the legislature specifically instructs the courts to liberally construe the provisions of the Act. CAL. GOV'T CODE §3602.

64. 39 Cal. App. 3d 900, 114 Cal. Rptr. 725 (1974), *vacated*, 42 Cal. App. 3d 645, 117 Cal. Rptr. 106 (1974).

65. *Id.* at 909, 114 Cal. Rptr. at 730. *But see* Gallagher v. Boller, 231 Cal. App. 2d 482, 490, 41 Cal. Rptr. 880, 885 (1964), a pre-Act case, applying a rule of strict construction when interpreting statutes allowing withholding of public records.

66. Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 652, 117 Cal. Rptr. 106, 110 (1974).

67. *Cf.* Kapellas v. Kofman, 1 Cal. 3d 20, 37-38, 459 P.2d 912, 923, 81 Cal. Rptr. 360, 371 (1969).

all of the Act's exemptive provisions.[68] In addition, this exemption is one which can conceivably apply to virtually any public record in the possession of the state and local agencies. The second category of exemptions may be characterized as those which are designed to protect state secrets and/or confidential sources of information.[69] These exemptions evidence the legislature's implicit concern for administrative efficiency. A third group of exemptions are specifically designed to preserve the right to privacy of individuals whose personal data is contained within public records.[70] Next, the analysis will turn to a single exemption of the Act designed to protect the work product and deliberative processes of the agencies.[71] Finally, the reader is given a brief analysis of the Act's other exemptive provisions which are of lesser significance.[72]

### *A. Section 6255: "Public Policy" Favors Nondisclosure*

The significance of Government Code Section 6255 lies in the fact that it provides a means by which an agency may withhold a public record which would not be exempt under any of the fourteen specific exemptions delineated in section 6254. Pursuant to section 6255, any record may be withheld if the agency is able to demonstrate that "on the facts of the particular case the *public interest* served by not making the record public *clearly outweighs* the *public interest* served by disclosure of the record."[73]

Section 6255 specifically states that there are two public interests which must be considered when access to a public record is at issue, the interest served by disclosure and the interest served by nondisclosure. However, this section does not purport to define these public interests. The public interest in disclosure is probably synonymous with the public's "right to know" and would thus embody all the concerns associated with the public's need to be informed of governmental activities.[74] This conclusion is warranted by an examination of the Records Act's various provisions. First, the legislature has declared that access to governmental information is a fundamental and necessary right of any person without regard to his personal characteristics or needs.[75] Second,

68. CAL. GOV'T CODE §6255; see text accompanying notes 73-93 *infra.*
69. CAL. GOV'T CODE §§6254(b), 6254(f), 6254(k); see text accompanying notes 94-149 *infra.*
70. CAL. GOV'T CODE §§6254(c), 6254(e), 6254(i); see text accompanying notes 150-175 *infra.*
71. CAL. GOV'T CODE §6254(a); see text accompanying notes 176-192 *infra.*
72. CAL. GOV'T CODE §§6254(g), 6254(h), 6254(j), 6254(n); see text accompanying notes 193-196 *infra.*
73. CAL. GOV'T CODE §6255 (emphasis added).
74. See text accompanying notes 17-26 *supra.*
75. CAL. GOV'T CODE §6250; see text accompanying notes 36-38 *supra.*

section 6255 places the burden upon the government to overcome this fundamental right by demonstrating either that the record comes within a specific exemption or that there is a public interest in nondisclosure which "clearly outweighs" this right. Thus, once an individual demonstrates that he wishes to inspect a public record in the possession of a government agency, his fundamental right to inspect that record arises.[76] Of course, it could be argued that section 6255, due to the inclusion of a case-by-case balancing of the public interests in disclosure and nondisclosure, peculiarly allows a court to examine a requesting individual's motives for requesting a record. This argument can be rebutted by two important considerations. First, section 6255 refers only to the *public interest* in disclosure, not to any private interests of the requesting individual. Second, and more importantly, once a particular record has been disclosed to any member of the public, the record must be made available to every other member of the public.[77] Therefore, it would seem useless in the long-run to examine private interests in disclosure because once one individual is found to be entitled to inspect the record in question, every other person must have an equal "right to know" the information embodied within that record; selective disclosure is not permitted.[78]

If the public interest in disclosure is synonymous with the "right to know," then it would seem that such an interest would be a heavy and constant weight in the balancing process. If this is true, then the propriety of exempting a record under section 6255 will depend upon the weight imputed to the public interest in nondisclosure. The concerns underlying the public's interest in nondisclosure are not so easily discerned, and thus they must be ascertained by referring to various sources of legislative intent.

The specific exemptions enacted in section 6254 may be of some aid in ascertaining the legislature's conception of the public interest in nondisclosure. An examination of section 6254 reveals that the legislature intended to protect from disclosure those records which would expose personal or financial information relating to an individual[79] or which compromise agency integrity by exposing state secrets,[80] confidential sources of information[81] or agency deliberative processes.[82] When the legislature balanced the competing interests in formulating

76. CAL. GOV'T CODE §6253(a).
77. See text accompanying notes 197-205 *infra.*
78. *Id.*
79. *See* CAL. GOV'T CODE §§6254(c), 6254(i), 6254(n).
80. *See* CAL. GOV'T CODE §§6254(b), 6254(f), 6254(h), 6254(k).
81. *See* CAL. GOV'T CODE §§6254(f), 6254(k).
82. *See* CAL. GOV'T CODE §6254(a).

section 6254, it found that the public interests in nondisclosure of these types of records outweighed the public interest in disclosure. It can be argued that section 6255 was designed to act as a catchall for those individual records similar in nature to the categories of records exempted by section 6254, but which the legislature determined, in balancing the competing interests, would not justify nondisclosure as a general rule. If this interpretation of section 6255 is accepted, the provisions of section 6254 will provide appropriate indicia as to the nature of the public interest in nondisclosure and will thus aid the courts in determining the disclosability of a document under section 6255.

The types of concerns comprising the public interest in nondisclosure may also be ascertained by referring to California's pre-Act case law. Section 6255 embodies the established California common law rule that public policy demands certain records should not be open to indiscriminate public inspection, even if they are in the custody of a public official and even if they contain material of a public nature.[83] Therefore it can be argued that the legislature, by embodying this common law rule in section 6255, intended to protect the same *interests* that were protected by prior case law. These interests were described by a California appellate court in *Craemer v. Superior Court*:[84]

> [W]here there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed. In this regard the term "public policy" means anything which tends to undermine that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel has a tendency to be injurious to the public or the public good.[85]

Even if it is found that disclosure of the record would undermine the public's sense of security for individual rights or would conflict with one of the purposes served by the exemptions delineated in section 6254, the record must still be disclosed unless it can be shown that the public detriment caused by disclosure "clearly outweighs" the public interest in disclosure.[86] The few cases that have been decided indicate that only the most compelling circumstances will justify nondisclosure of a public record. For example, there are two cases which have denied disclosure in order to promote the compelling public interest in guaranteeing

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83. *See e.g.*, City & County of San Francisco v. Super. Ct., 38 Cal. 2d 156, 238 P.2d 581 (1951); Craemer v. Super. Ct., 265 Cal. App. 2d 216, 71 Cal. Rptr. 193 (1968); Runyon v. Bd. of Prison Terms and Paroles, 26 Cal. App. 2d 183, 70 P.2d 101 (1938).

84. 265 Cal. App. 2d 216, 71 Cal. Rptr. 193 (1968).

85. *Id.* at 222, 71 Cal. Rptr. at 199.

86. CAL. GOV'T CODE §6255.

criminal defendants a fair trial. In *Craemer*, a pre-Act case,[87] the court found that the transcripts of on-going grand jury proceedings could lawfully be exempted from public disclosure. The court noted, however, that the public interest in nondisclosure would dissipate once the proceedings were completed. At that time, the public interest in providing the defendants a fair investigation would have been satisfied and the public's interest in guarding against "secret tribunals" would necessitate disclosure of the records.[88] In a post-Act case, *Yarish v. Nelson*,[89] another court found that the release of a criminal defendant's prison files to the press could seriously prejudice his right to a fair trial and therefore denied disclosure. In reaching this decision the court noted that the defendant was charged with murder and kidnapping in a highly-publicized case and that the trial court had entered a publicity order.[90]

In the absence of compelling circumstances the courts will apparently require disclosure. For example, in *Uribe v. Howie*,[91] the Agricultural Commissioner contended that the public interest in the effectiveness of the Commission's pesticide control program required that the reports given by pesticide applicators be exempted from public disclosure. The Commissioner argued that he would lack confidence in the accuracy of the reports if the applicators knew that the reports would be made public. The court found that the public interest in maintaining the confidentiality of the reports was not strong enough to clearly outweigh the public need for this data.[92] The court noted that such information could be useful in studying the long-range effects of pesticides on human and animal life.[93] Therefore, disclosure of the record was ordered.

### *B. Section 6254: Specific Exemptions*

#### 1. *Prohibited By Law; Privilege*

Subsection 6254(k) is perhaps the most crucial and far-reaching

87. Although *Craemer* was decided before the enactment of the Records Act, its reasoning may still be persuasive; see text accompanying notes 83-85 *supra*.
88. 265 Cal. App. 2d 216, 226, 71 Cal. Rptr. 193, 201 (1968).
89. 27 Cal. App. 3d 893, 104 Cal. Rptr. 205 (1972).
90. *Id.* at 902-03, 104 Cal. Rptr. at 212.
91. 19 Cal. App. 3d 194, 96 Cal. Rptr. 493 (1971).
92. *Id.* at 210, 96 Cal. Rptr. at 503.
93. *Id.* It would appear that, by enumerating the factors that bolstered the public interest in disclosure, the *Uribe* court was treating the public interest in disclosure as a variable, rather than as a constant, factor in the balancing process. However, it should be noted that the court's discussion of the public interests in disclosure and nondisclosure related to the evidentiary privilege for trade secrets. CAL. EVID. CODE §1060; see note 97 *infra*. When the court reached its discussion of Government Code section 6255 it merely stated that it had already discussed the balancing of the competing public interests and found that disclosure best served the public interest. Thus, in relation to section 6255, the *Uribe* court never stated that the public interest in disclosure was or was not a constant in the balancing process. 19 Cal. App. 3d at 213, 96 Cal. Rptr. at 505.

exemption of the Records Act. It exempts "[r]ecords the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege."[94] This exemption was apparently enacted to insure that the Records Act would not be used as a means of circumventing the many statutes which exist independently of the Act and which prohibit or condition the disclosure of governmental records.[95] In addition, this subsection absolutely prohibits disclosure of public records containing information which is unconditionally privileged under various provisions of the Evidence Code.[96]

The most troublesome of the evidentiary privileges brought within the Records Act by subsection 6254(k), and the privilege which seems to be most frequently asserted to protect public records from disclosure,[97] has been the privilege relating to "official information" set forth in Evidence Code Section 1040. This privilege can be asserted by a government agency whenever "official information" is contained within a public record. Section 1040 defines "official information" as "information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made."[98] Whether the information has been acquired in confidence is determined by statute or as a matter of public policy.[99] In the absence of a statute expressly declaring that a certain record is received in confidence, information will generally be considered to be confidential if its disclosure would impair the government's ability to obtain similar information in the future.[100] Once it has been determined that the government possesses official information, section 1040 creates a privilege which is partly absolute and partly conditional in nature. Subsection 1040(b)(1) creates an absolute privilege for official information the disclosure of which is forbidden by either federal or state law. Under subsection 1040(b)(2), all other official informa-

94. CAL. GOV'T CODE §6254(k).

95. For a comprehensive list of all California statutes pertaining to public records, see the "Index of Code Sections Relating to Public Records," ASSEMBLY INFORMATION COMMITTEE, *supra* note 6, Appendix A, 33-40. This index, however, is only current to 1970.

96. *E.g.*, CAL. EVID. CODE §§954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege).

97. Two California appellate courts have also dealt with the incorporation of the privilege for trade secrets under California Evidence Code Section 1060. Calif. School Employees Ass'n v. Sunnyvale Elem. Sch. Dist., 36 Cal. App. 3d 46, 65-66, 111 Cal. Rptr. 433, 445 (1974); Uribe v. Howie, 19 Cal. App. 3d 194, 206-11, 96 Cal. Rptr. 493, 500-04 (1971).

98. CAL. EVID. CODE §1040(a).

99. B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK, §42.1 (1972).

100. *See* City & County of San Francisco v. Super. Ct., 38 Cal. 2d 156, 162-63, 238 P.2d 581, 585 (1951); Runyon v. Bd. of Prison Terms and Paroles, 26 Cal. App. 2d 183, 185, 79 P.2d 101, 102 (1938).

tion is privileged from disclosure only if "[d]isclosure of the information is against the public interest because the necessity for preserving the confidentiality of the information outweighs the necessity for disclosure in the interest of justice . . . ."[101]

It should be noted that while this evidentiary privilege deals with "information" whereas the Records Act is concerned with "records," there is no conflict between Evidence Code Subsection 1040(b)(1) and Government Code Subsection 6254(k)—both provisions yield to specific exempting or prohibitory state or federal statutes. On the other hand, there is arguably a conflict between Evidence Code Section 1040(b)(2) and Government Code Section 6255. The California Attorney General has suggested that reference solely to Government Code Subsection 6254(k) and Evidence Code Section 1040 would result in a "curious circular process" because subsection 6264(k) permits privileged information to be kept confidential, while section 1040 creates a privilege for information which is already confidential.[102] The Attorney General solves this alleged dilemma by making reference to Government Code Section 6255, pointing out that the legislative aim of subsection 1040(b)(2) is the furtherance of the policy enunciated by section 6255.[103] The Attorney General's resolution of this problem however appears to be analytically unsound. It seems that subsection 6254(k) merely provides that if a public record contains "official information" which is otherwise entitled to protection under Evidence Code Section 1040, such protection is also afforded by an exemption of the Records Act.[104] In other words, for the purposes of initially analyzing the evidentiary privilege, subsection 6254(k) may be ignored.[105]

The Attorney General's opinion that Evidence Code Section 1040(b)(2) is the furtherance of the policy enunciated by section 6255 engenders important questions as to the interrelationship of these two facially similar provisions. When a public entity asserts a conditional

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101. Evidence Code Section 1040 specifically grants this privilege only to the public entity. This privilege is waived if the information is disclosed to anyone other than another interested public official; *see* Markwell v. Sykes, 173 Cal. App. 2d 642, 649-50, 343 P.2d 769, 774 (1959). *See generally* Comment, *Governmental Privileges: Roadblock to Effective Discovery*, 7 U.S.F.L. REV. 282, 285-86 (1972-73).

102. 53 OPS. ATT'Y GEN. 148 (1970).

103. *Id.* at 148-49.

104. Government Code Subsection 6254(k) merely continues the pre-Act policy of keeping certain records closed to public inspection due to specific governmental statutory privileges. *See* Comment, *Inspection of Public Records Under California Law*, 50 CAL. L. REV. 79, 84-87 (1962).

105. It should be noted here that by the incorporation of Evidence Code Section 1040, an agency will be able to assert this privilege whenever a member of the public requests inspection of a public record embodying official information. Standing by itself, section 1040 may only be asserted at proceedings in which testimony may be compelled. *See* McDonough, *The California Evidence Code: A Précis*, 18 HAST. L.J. 89, 106 (1966).

privilege under Evidence Code Subsection 1040(b)(2) the court must engage in a weighing or balancing process in order to ascertain whether the public interest in securing information on a privileged, confidential basis outweighs the necessity for disclosure.[106] In performing this task the court must balance the public interest involved without regard to the government's interest, if any, as a party in the outcome of the litigation.[107] Furthermore, the burden is on the public entity to demonstrate that it would be against the public interest to disclose the information.[108]

Although subsection 1040(b)(2) includes a balancing test which appears to be similar to that included in Government Code Section 6255, it seems that the two provisions may be meaningfully distinguished in two respects. First, Government Code Section 6255 refers to the *public* interest in disclosure, while subsection 1040(b)(2) refers to the "necessity for disclosure in the interest of justice." Thus, while the public interest in disclosure under section 6255 must be ascertained without examining the particular needs or qualifications of the requesting individual,[109] the language of subsection 1040(b)(2) indicates that the courts will examine the specific legal needs of the party who is seeking disclosure;[110] arguably a much narrower interest than the aforementioned *public* interest. On the other side of the scale, the interest in maintaining the confidentiality of official information is probably that of allowing the government to operate more effectively by protecting its secrets,[111] and is thus, at least superficially, a narrower interest than the "public interest in nondisclosure." Second, subsection 1040(b)(2) requires that the interest in nondisclosure "outweigh" the interest in disclosure, whereas section 6255 requires that the former interest must "*clearly* outweigh" the latter. Therefore, since subsection 1040(b)(2) does not require the balance to tip as heavily in favor of nondisclosure as

106. B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK, §42.1 (1972).
107. CAL. EVID. CODE §1040(b)(2).
108. *Id.* At this time the court will determine the correctness of the public official's initial decision that the privilege for official information applies to the information in question. Markwell v. Sykes, 173 Cal. App. 2d 642, 647, 343 P.2d 769, 772 (1959). Appellate cases have shown that the asserted privilege will be honored if the government can make some showing that the free flow of information may be impeded in the future should the privilege be denied. *See, e.g.*, City & County of San Francisco v. Super. Ct., 38 Cal. 2d 156, 162, 238 P.2d 581, 584 (1951). However, mere allegations of future harm will not sustain the privilege; the government must demonstrate some plausible justification for protecting the information. Uribe v. Howie, 19 Cal. App. 3d 194, 210, 96 Cal. Rptr. 493, 503 (1971).
109. See text accompanying notes 76-78 *supra.*
110. *See* People v. Super. Ct., 19 Cal. App. 3d 522, 530, 97 Cal. Rptr. 118, 123 (1971); OPINION OF THE LEGISLATIVE COUNSEL, "Report of Assembly Committee on Judiciary on Assembly Bill No. 333," JOURNAL OF THE ASSEMBLY, vol. 1, 1751-52 (1965 Reg. Sess.).
111. OPINION OF THE LEGISLATIVE COUNSEL, "Report of Assembly Committee on Judiciary on Assembly Bill 333," JOURNAL OF THE ASSEMBLY, vol. 1, 1751 (1965 Reg. Sess.).

does section 6255, and since subsection 1040(b)(2) balances interests which are arguably more narrow than the public interests included within section 6255, it would appear that Evidence Code Section 1040(b)(2) is designed to afford more protection for governmental information than is Government Code Section 6255.[112] Hence, it could be argued that the Attorney General is incorrect in his assertion that the requirements of these two provisions are equivalent.

The obvious differences between the balancing tests found in Evidence Code Subsection 1040(b)(2) and Government Code Section 6255 could be of great importance to the requesting individual, depending upon his need for the information in question. If an agency can show that the requested record contains official information, the court will be compelled to use the test embodied in Evidence Code subsection 1040(b)(2) rather than the stricter test embodied in Government Code Section 6255. As noted previously, the former test requires that the court examine the requesting individual's private needs for the information "in the interest of justice." It would seem that the criminal defendant who needs the information in order to conduct a proper defense will often be able to overcome the conditional privilege for official information. However, an entirely different question is presented when the only "interest" asserted is the individual's "fundamental right of access" granted by Government Code Section 6250. In light of the many other federal and state statutes coming into play through Government Code Subsection 6254(k) which prevent public inspection of certain records, it would seem that the fundamental right of access, or the "right to know," will not be, standing alone, a sufficient "interest" to overcome the privilege attaching to official information. Therefore, it might be asserted that Evidence Code Section 1040 offers a unique method by which an agency may defeat the public's right to inspect a public record, notwithstanding the fact that the particular record would not be exempt under any of the Act's exemptions other than subsection 6254(k).

2. *Investigatory Files*

Subsection 6254(f) is a pervasive exemption which may encompass a significant number of public records in the possession of certain state and local agencies. This provision exempts

112. One court has observed that "[i]t is also generally recognized that when the public interest in securing information necessitates the free communication of such information on a privileged, confidential basis, disclosure of information so secured is against the public interest." Terzian v. Super. Ct., 10 Cal. App. 3d 286, 295, 88 Cal. Rptr. 806, 814 (1970). Surely the scale would not tip so readily in favor of nondisclosure if the exemption under Government Code Section 6255 were asserted by a government agency.

> [r]ecords of complaints to or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes.[113]

Structurally, subsection 6254(f) can be bifurcated into the following elements: first, the record must embody a complaint, an investigatory file, intelligence information, or security procedures; secondly, it must be in the possession of the Attorney General, the Department of Justice, any police agency or any other agency which compiles records for correctional, law enforcement, or licensing purposes.[114]

The language of subsection 6254(f) appears to be absolute in exempting records of complaints, investigatory files, intelligence information, and security procedures. In order to prevent the agencies from rendering records exempt merely by labeling them as such, the courts have attempted to define the criteria which must be met in order for a record to qualify for an exemption under subsection 6254(f). Although California appellate cases have briefly dealt with "complaints"[115] and "security procedures,"[116] the major difficulty has arisen in relation to the term "investigatory files." Thus far, the California courts appear to be following the definition of an "investigatory file" delineated in a federal FOIA case, *Bristol-Myers Co. v. FTC.*[117] In that case, the District of Columbia Circuit held that an "investigatory file" exists only when there is a *concrete and definite prospect* that enforcement proceedings will be initiated.[118] The first California case to adopt this restrictive definition, *Uribe v. Howie,*[119] noted its reasons for doing so:

> It is not enough that an agency label its file "investigatory" and suggest that enforcement proceedings may be initiated at some unspecified future date or were previously considered . . . .

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113. CAL. GOV'T CODE §6254(f).

114. Although "records of complaints" and "intelligence information" are not included in the second clause of subsection 6254(f) pertaining to "correctional law enforcement or licensing purposes," one California appellate court has held that these terms are implicitly included within "any such investigatory or security files." Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 650-51, 117 Cal. Rptr. 106, 111 (1974).

115. A "complaint" is not per se a part of an investigatory file and is not dependent upon the creation of one. As a result, the record of complaint is exempted by its content as an independent document. 42 Cal. App. 3d at 653, 117 Cal. Rptr. at 110-11.

116. One California appellate court has ruled that "security purposes" include, in addition to "building plans, lay-out plats, maps and diagrams that depict [correctional facilities]," lists compiled by the Department of Corrections for security purposes indicating inmate membership in violent or disruptive organizations. Procunier v. Super. Ct., 35 Cal. App. 3d 211, 212, 110 Cal. Rptr. 531, 531 (1973).

117. 424 F.2d 935 (D.C. Cir. 1970) (interpretting 5 U.S.C. §552(b)(7) (1967)).

118. *Id.* at 939.

119. 19 Cal. App. 3d 194, 96 Cal. Rptr. 493 (1971).

> . . . In their course of activities the regulatory agencies of this state accumulate numerous records which may, under certain circumstances, be used in disciplinary proceedings. Virtually any record so kept could be put to such use. To say that the exemption created by subdivision (f) is applicable to any document which a public agency might, under any circumstances, use in the course of a disciplinary proceeding would be to create a virtual *carte blanche* for the denial of public access to public records. The exception would thus swallow the rule. This could not have been the intent of the Legislature.[120]

The *Uribe* holding has since been explicitly adopted by one other California appellate decision[121] and cited by another,[122] thereby indicating that the "concrete and definite" requirement may ultimately become the accepted California definition.[123]

It is significant, however, that the federal interpretation of an "investigatory file" has been undergoing an evolutionary process since the *Bristol-Myers* decision.[124] Although there is at least one federal circuit adhering to the *Bristol-Myers* definition,[125] the present weight of authority is clearly moving toward a broader, much less restrictive definition of an "investigatory file."[126] The D.C. Circuit has unquestionably abandoned the *Bristol-Myers* definition in several of its subsequent cases,[127] holding in one case that a file is "investigatory" if it is "compiled for *adjudicative or enforcement* purposes. Whether the adjudication or en-

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120. *Id.* at 212-13, 96 Cal. Rptr. at 504-05 (citations omitted).

121. State of California *ex rel.* Div. of Indus. Safety v. Super. Ct., 43 Cal. App. 3d 778, 784, 117 Cal. Rptr. 726, 729 (1974).

122. Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 651, 117 Cal. Rptr. 106, 109 (1974).

123. In addition, it seems implicit in *Uribe* that the exemption has a definite duration. Once enforcement proceedings have been terminated there is no longer a concrete and definite prospect of such proceedings; thus, the record would no longer fall within the definition of an "investigatory file" and would not be exempt from disclosure. It should be noted, however, that the language of Government Code Subsection 6254(f) imposes no durational limitations once it has been found that the exemption applies.

124. *See* Comment, *The Investigatory Files Exemption to the Freedom of Information Act*, 1974 WASH. U.L.Q. 463 (1974). It should also be noted that 5 U.S.C. §552 (b)(7) has recently been amended to specifically enumerate the purposes for which an investigatory file may be exempt. 5 U.S.C. §552(b)(7), *amended*, 88 STATS. 1563-1564 (1975).

125. *See* Wellford v. Hardin, 444 F.2d 21, 25 (4th Cir. 1971).

126. *E.g.*, Center for Nat'l Policy Review on Race and Urban Issues v. Weinberger, 502 F.2d 370, 374 (D.C. Cir. 1974); Rural Housing Alliance v. Dept. of Agriculture, 498 F.2d 73, 80 (D.C. Cir. 1974); Aspin v. Dept. of Defense, 491 F.2d 24, 28-29 (D.C. Cir. 1973); Weisberg v. Dept. of Justice, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); Frankel v. SEC, 460 F.2d 813 (2d Cir. 1972), *cert. denied*, 409 U.S. 889 (1972); Evans v. Dept. of Transp., 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).

127. *E.g.*, Center for Nat'l Policy Review on Race and Urban Issues v. Weinberger, 502 F.2d 370, 374 (D.C. Cir. 1974); Rural Housing Alliance v. Dept. of Agriculture, 498 F.2d 73, 80 (D.C. Cir. 1974); Aspin v. Dept. of Defense, 491 F.2d 24, 28-29 (D.C. Cir. 1973); Weisberg v. Dept. of Justice, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

forcement has been completed is not determinative, nor is the degree of likelihood that the adjudication or enforcement may be imminent . . . ."[128] In addition, these courts have held that the exemption remains in effect indefinitely in order to promote the long-term governmental interests that the various courts have identified as being served by the exemption.[129] Therefore, in light of the federal developments in the area, there is a distinct possibility that a future California court may reject the *Uribe* line of analysis and adopt the new federal approach.

The inherent bifurcation to which subsection 6254(f) lends itself indicates that it is not only the type of record involved that will be important in determining the applicability of the exemption, but also the type of agency which compiles it. This conclusion is evidenced by a recent California appellate court's interpretation of the meaning of the term "law enforcement purposes." In *State of California ex rel. Division of Industrial Safety v. Superior Court*,[130] the court stated that the exemption does not *ipso facto* apply to the investigatory files of any administrative agency which is responsible for the enforcement of one or more statutes.[131] The court held that the term " 'law enforcement purposes' . . . refers to law enforcement in the traditional sense—that is, to the enforcement of penal statutes, etc."[132] To be compiled for "law enforcement purposes" the subject matter of the agency's files "must relate to the same type of criminal law enforcement subject matter as is covered generally by the immediately preceding provisions of [subsection 6254(f)],"[133] which provide that a record must be in the possession of the Attorney General, the Department of Justice, or any state or local police agency.

In light of the express language of subsection 6254(f) and of the *Division of Industrial Safety* court's references to "penal statutes" and

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128. Rural Housing Alliance v. Dept. of Agriculture, 498 F.2d 73, 80 (D.C. Cir. 1974). However, if *no* enforcement proceedings are contemplated, the investigatory file cannot be exempt. Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Baltimore, 508 F.2d 945, 949 (4th Cir. 1974).

129. Various federal courts have proposed justifications for the indefinite duration of the exemption for "investigatory files:" (1) preservation of the secrecy of investigative techniques; Aspin v. Dept. of Defense, 491 F.2d 24, 29-30 (D.C. Cir. 1973); Frankel v. SEC, 460 F.2d 813, 817 (2d Cir. 1972); (2) preservation of confidential sources of information; Evans v. Dept. of Transp., 446 F.2d 821, 823 (5th Cir. 1971); Cowles Communication, Inc. v. Dept. of Justice, 325 F. Supp. 726, 727 (N.D. Cal. 1971); (3) preservation of prosecutorial discretion; Weisberg v. Dept. of Justice, 489 F.2d 1195, 1201 (D.C. Cir. 1973); Exxon Corp. v. FTC, 384 F. Supp. 755, 762 (D.D.C. 1974); and (4) preservation of the privacy of individuals who are the subject of the investigation; Center for Nat'l Policy Review on Race and Urban Issues v. Weinberger, 502 F.2d 370, 374 (D.C. Cir. 1974); *contra*, Wellford v. Hardin, 444 F.2d 21, 24 (4th Cir. 1971).

130. 43 Cal. App. 3d 778, 117 Cal. Rptr. 726 (1974).

131. *Id.* at 784, 117 Cal. Rptr. at 730.

132. *Id.*

133. *Id.*

"criminal law enforcement subject matter," it is manifest that agencies which compile records for the purposes of enforcing criminal laws are engaged in "law enforcement purposes." It should be noted, however, that "penal statutes" are not limited to those laws which are a part of the Penal Code.[134] A "penal statute" is any any statute that "imposes a penalty or creates a forfeiture as the punishment for the neglect of some duty or the commission of some wrong . . . commanded or prohibited by law."[135] Therefore, it could be argued that an agency is engaged in "law enforcement purposes" when it compiles an investigatory file for the purpose of imposing a civil penalty.[136] On the other hand, under the *Division of Industrial Safety* holding, it would seem that files compiled pursuant to an investigation which is intended to culminate in the issuance of an order to comply with the law would not bring the exemption into operation.[137] Since a mere order to comply would not result in a penalty or forfeiture, the statute authorizing the agency to issue an order would not be a "penal statute."[138]

While the *Division of Industrial Safety* decision leaves the definition of "law enforcement purposes" unclear, the case is significant because it may portend a restrictive interpretation of that term by the California courts. In light of the qualifying language in subsection 6254(f), it would seem that the legislature may have intended to restrict the meaning of that term. By using the phrase "correctional, law enforcement, or licensing purposes," it appears that the legislature definitely intended to limit the types of agencies which could avail themselves of this exemption. If the legislature had intended for the exemption to apply to the files of *any* agency which is responsible for the enforcement of *any*

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134. *Ex parte* Liddell, 93 Cal. 633, 640, 29 P. 251, 254 (1892).

135. Levy v. Super. Ct., 105 Cal. 600, 607, 38 P. 965, 966 (1895).

136. It could be argued that the imposition of a civil penalty would not be within the *Division of Industrial Safety* court's requirement of "criminal law enforcement subject matter." One California court has held that a civil penalty is not completely criminal in nature because there is no peril of the loss of liberty. People v. Witzerman, 29 Cal. App. 3d 169, 176-77, 105 Cal. Rptr. 284, 288-89 (1972).

137. For example, the Division of Industrial Safety is vested with the power to issue and enforce orders and special orders pertaining to industrial safety. CAL. LABOR CODE §6305 *et seq.* These orders are issued to employers, directing them to correct unsafe conditions, devices, or places of employment which pose a threat to the health or safety of an employee.

138. Although the proposed distinction between an investigation resulting in the imposition of a civil penalty and one resulting in the issuance of an agency order would seem to comport with the *Division of Industrial Safety* holding, it would appear to present a serious problem as to the classification of certain files. For example, an agency may instigate an investigation in order to determine whether there is a violation of a law, and if there is a violation, what action should be taken. Until the agency decides to impose a civil penalty, or to take even stronger action, it would seem that the file in question would not be compiled for "law enforcement purposes" under *Division of Industrial Safety*. Thus, the applicability of the exemption would essentially depend upon what *action* the agency takes, not upon the *content* of the file. It would seem that the availability of *any* exemption should depend upon the latter consideration.

criminal or civil law, it would seem contradictory to have qualified the second clause of subsection 6254(f) by adding the terms "correctional" and "licensing."[139]

It seems clear from the preceding discussion that the scope and operation of the exemption found in subsection 6254(f) is far from final resolution by the courts. California is offered the option of either adopting the broader, less restrictive definitions of "investigatory file" and "law enforcement" being developed by the federal courts, or of adopting its own, more narrow definitions. Whatever the ultimate determination in the California courts, a consistent formulation of these terms seems desirable in order to give full effect to this important exemption.

### 3. *Pending Litigation or Tort Claims Involving a Public Agency*

Under subsection 6254(b), an exemption is allowed for records pertaining to pending litigation or tort claims[140] to which a public agency is a party.[141] This exemption is conditional, remaining in effect only "until such litigation or claim has been finally adjudicated or otherwise settled." A California appellate court has stated that the main purpose of this provision is to provide "public agencies with the protection of the attorney-client privilege, including work-product, for a limited

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139. In 1975 the legislature enacted an amendment to subsection 6254(f) to delete the word "licensing" from the term "for correctional, law enforcement or licensing purposes" and to add further qualifying language:

> Records of complaints to or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local agency *for correctional or law enforcement purposes or for the purpose of determining whether administrative or criminal action should be taken to restrain or prosecute purported violations of law or to deny, suspend, or revoke a professional, vocational, or occupational license, certification, or registration.*

CAL. GOV'T CODE §6254(f), *as amended*, CAL. STATS. 1975, c. 1231, §1, at — (SB 2, 1975-76 Reg. Sess., *as amended by the Assembly*, Sept. 11, 1975) (emphasis added). However, due to an oversight, this amendment was nullified, or "chaptered out," under the authority of Government Code Section 9605 when the legislature passed another bill during the same session which changed subsection 6254(f) back to its present and original form. *See* CAL. GOV'T CODE §6254, *as amended*, CAL. STATS. 1975, c. 1246, § —, at —. The fact that this subsection was amended in such a fashion is significant for two reasons. First, it further supports the contention that "law enforcement purposes" is not intended to apply to the enforcement of all criminal and civil laws. And, second, it indicates that the legislature will probably reamend subsection 6254(f) in 1976.

It should be noted that a restrictive California interpretation of "law enforcement purposes" is a significant departure from the accepted federal interpretation of the same term in the FOIA. Under the analogous FOIA exemption, "law enforcement" has been interpreted to encompass *all* criminal and civil laws. *See, e.g.*, Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Baltimore, 508 F.2d 945, 949 (4th Cir. 1974); Center for Nat'l Policy Review on Race and Urban Issues v. Weinberger, 502 F.2d 370, 373 (D.C. Cir. 1974); Koch v. Dept. of Justice, 376 F. Supp. 313, 315 (D.D.C. 1974).

140. These are claims against the government brought pursuant to CAL. GOV'T CODE §810 *et seq.*

141. The reader should note that this exemption can include files that would not qualify as "investigatory files" for purposes of a §6254(f) exemption. See text accompanying notes 113-139 *supra.*

period while there is ongoing litigation."[142] Although preservation of this privilege could be one of the purposes behind the exemption, it seems that the agencies would already be afforded this privilege under the authority of Government Code Subsection 6254(k). Furthermore, subsection 6254(b) has been interpreted to encompass many more types of records then would be protected by the attorney-client or work-product privileges.[143] Thus, it would seem that this subsection was primarily designed to prevent a litigant opposing the government from using the Records Act's disclosure provisions to accomplish earlier or greater access to records pertaining to pending litigation or tort claims than would otherwise be allowed under the rules of discovery,[144] rather than being aimed solely at preventing discovery of a limited class of documents falling within the purview of the attorney-client or work-product privileges. Under this construction, the government is placed in legal parity with other litigants regarding access to records which pertain to pending litigation.

It seems obvious that the scope of subsection 6254(b) is potentially broad enough to encompass a vast number of agency records. Whether this potentiality will be realized, however, depends upon the judiciary's answers to the following questions: (1) what is "pending litigation" or a tort claim; (2) what is the duration of the exemption; and (3) are there certain types of records to which this exemption does not apply?

The exemption under subsection 6254(b) arises only when litigation is pending. Under California law, a civil action is pending once it has been commenced,[145] and commencement occurs when there has been a filing of a complaint and service of process on the defendant.[146] In the case of a tort claim, it would seem that the analagous time for the exemption to become operative is when the claim is filed with the agency pursuant to Government Code Section 910.[147] Therefore, it can be argued that the exemption does not arise until an action or tort claim has been filed. If this interpretation is adopted, it would appear that a prospective litigant could circumvent the exemption merely by request-

142. State of California *ex rel.* Div. of Indus. Safety v. Super. Ct., 43 Cal. App. 3d 778, 783, 117 Cal. Rptr. 726, 729 (1974).

143. For example, a court has noted that Government Code Section 6254(b) is broad enough to include trade secrets. Calif. Sch. Emp. Ass'n v. Sunnyvale Elem. Sch. Dist., 36 Cal. App. 3d 46, 65, 111 Cal. Rptr. 433, 445 (1974).

144. *See* City of Los Angeles v. Super. Ct., 33 Cal. App. 3d 778, 784-85, 109 Cal. Rptr. 365, 369 (1973).

145. CAL. CODE CIV. PROC. §1049.

146. *E.g.*, San Francisco Gas & Elec. Co. v. Super. Ct., 155 Cal. 30, 99 P. 359 (1908).

147. Government Code Section 910 sets out the procedure that must be followed when bringing a tort claim against a government entity.

ing disclosure of any record prior to the actual filing of his action or claim.[148]

Literal compliance with the terms of subsection 6254(b) would result in this exemption being operative until the "litigation or claim has been finally adjudicated or otherwise settled." This interpretation comports with California Code of Civil Procedure Section 1049, which provides that a civil action is pending until its final determination upon appeal, or until its final adjudication or satisfaction of judgment. However, notwithstanding the express language of subsection 6254(b), it can be argued that the exemption should no longer apply once the information has been obtained by the opposing litigant through discovery. Support for this proposition may be found in federal case law interpreting the FOIA. Federal decisions have held that an FOIA exemption which is primarily designed to prevent premature discovery becomes inoperative once the information has been discovered.[149] Since subsection 6254(b) is apparently designed to accomplish this same end, it would seem that the federal analysis should be persuasive in interpreting that subsection. Furthermore, by construing subsection 6254(b) in this manner both the Records Act's major goal of allowing maximum disclosure of public records on a nonselective basis and the government's need to effectively litigate its case would be promoted.

There is also some question as to the types of records which may be withheld pursuant to subsection 6254(b). On its face the exemption authorizes an agency to withhold from all members of the public any record that pertains to pending litigation or to tort claims. Therefore, a record that was formerly accessible to the public may conceivably become exempt from disclosure if someone files a lawsuit or tort claim to which the record pertains. This result would be detrimental to the opposing party, who would be precluded from access except by way of discovery proceedings, and to the public, which would be completely denied access. In order to prevent this problem, it could be argued that the exemption should cover only those records which come into existence *after* the action or claim has been filed. Although a party opposing the government will be able to gain earlier access to records by

148. The fifth version of the legislative bill which became the Records Act included the term "*prospective* litigation." AB 1381, 1968 Regular Session, *as amended by the* Senate, July 19, 1968. The modifier "prospective" was deleted and replaced with "pending," which would seem to indicate that the legislature contemplated the requirement of filing an action or claim before the exemption would be operative. AB 1381, 1968 Regular Session, *as amended by the* Senate, July 27, 1968.

149. *E.g.*, Wellford v. Hardin, 444 F.2d 21, 23-24 (4th Cir. 1971); Legal Aid Soc'y of Alameda County v. Shultz, 349 F. Supp. 771, 777 (N.D. Cal. 1972). These cases refer to the FOIA exemption dealing with "investigatory files." 5 U.S.C. §552(b)(7) (1967).

exercising his right to inspect prior to filing an action or claim than he would have under the rules of discovery, this effect would seem to be of minimal consequence when compared to the public detriment resulting from nondisclosure. Since one of the primary purposes of the Records Act is to provide the public with maximum, nonselective access to public records, it would seem to be more desirable to perpetuate the accessibility of records that have originally been available to the public than it is to prevent an opposing litigant from achieving earlier access to a record that he will probably be able to discover in any event. Thus, once a record has been made available for public inspection, it should continue to be open to the public even if it subsequently pertains to pending litigation or tort claim.

4. *Personnel, Medical, or Similar Files*

Subdivision 6254(c) creates an exemption for "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." This exemption epitomizes the legislature's attempt to resolve the inherent conflict between the "right to know" and the right to privacy.[150] It is conceivably broad enough to cover many types of records, depending upon the interpretation of "similar files." However, to date no California case has yet interpreted this section and the federal cases interpreting the almost identical FOIA provision[151] have divided over its meaning. The exemption presents a conjunctive test, consisting of two elements. To be exempt the material must be a personnel, medical, or similar file, *and* its disclosure must constitute an *unwarranted* invasion of privacy. With regard to the first element of this test, "personnel files" have been classified as including both the personnel records of government employees and those of private citizens who are required to submit similar information to the government[152] and "similar files" have been classified as those records containing data concerning very personal or intimate details of an individual's life.[153]

Once it has been determined that a record is a "personnel, medical, or similar file," in order to be exempt, the agency must still demonstrate that its disclosure would constitute an unwarranted invasion of privacy. The federal cases have been divided over the test to be applied in determining when the disclosure of a file will constitute an unwarranted

150. See text accompanying notes 17-26 *supra*.
151. 5 U.S.C. §552(b)(6) (1967).
152. 53 OPS. ATT'Y GEN. 144 (1970).
153. Robles v. EPA, 484 F.2d 843, 845 (4th Cir. 1973).

invasion of personal privacy. In *Getman v. NLRB*,[154] the court held that the exemption authorizes the courts to equitably "balance the right of privacy of affected individuals against the right of the public to be informed."[155] In that case two labor law professors requested the names and addresses of certain union members whom they wished to contact in relation to a study on union elections. The court, in granting access to these records, held that the disclosure of the desired information constituted only a minor invasion of the union members' privacy and that this invasion was justified in light of the quality of the study, the background and qualifications of the applicants, and the public's interest in the study itself. Although the court recognized that this approach was inconsistent with the FOIA's general policy of nonselective disclosure, it felt that the language of this particular exemption *uniquely* necessitated an examination of the requesting party's motives.[156] Accordingly, the court stated that requests by future applicants would have to undergo a similar balancing test and if the applicants were "less well-qualified" or envisioned a "less carefully designed or more disruptive study," disclosure might be denied.[157]

The hypothetical situation envisioned by the *Getman* court became a reality three years later in *Wine Hobby, USA, Inc. v. Bureau of Alcohol, Tobacco & Firearms*.[158] In that case the applicants were distributors of wine-making equipment who wanted to send advertising brochures to amateur winemakers. In order to effectuate this plan they sought the names and addresses of all amateur winemakers filing for tax-exempt status. In granting disclosure of the requested records the trial court rejected the contention that the records were "similar files" within the meaning of the FOIA exemption, and, in addition, apparently rejected the reasoning of *Getman*.[159] The circuit court reversed, holding that the exemption did apply on the facts presented.[160] The court reasoned that since the applicants wanted the information for commercial purposes there was no direct or indirect public benefit. Therefore, subjecting the amateur winemakers to continuous mail from Wine Hobby, USA, Inc. would clearly constitute an unwarranted invasion of privacy.[161]

The problems with the *Getman-Wine Hobby* approach are obvious. First, when the courts undertake to weigh equitable factors such as the

154. 450 F.2d 670 (D.C. Cir. 1971), *stay denied*, 404 U.S. 1204 (1971).
155. *Id.* at 674.
156. *Id.* at 674, n.10.
157. *Id.*
158. 502 F.2d 133 (3d Cir. 1974).
159. Wine Hobby, USA, Inc. v. Bureau of Alcohol, Tobacco & Firearms, 363 F. Supp. 231 (E.D. Pa. 1973), *rev'd*, 502 F.2d 133 (3d Cir. 1974).
160. 502 F.2d 133 (3d Cir. 1974).
161. *Id.* at 137.

applicant's need for the information, access to public records becomes more difficult and uncertain. More importantly, the utilization of this approach results in selective disclosure of public records. This result is contrary to the fundamental goal of the FOIA and the Records Act, which is to grant *all* persons equal right of access to public records without respect to certain individuals who are judged to be deserving on the facts of a particular case.[162]

A different interpretation of this exemption has been developed by another federal decision, *Robles v. EPA*.[163] In *Robles* the plaintiffs sought access to the names and addresses of individuals whose homes had been the subject of scientific tests relating to the use of uranium tailings for land fill. The court held that the interest of the party seeking disclosure was irrelevant; the right of access under the FOIA "is not to be resolved by a balancing of equities or a weighing of need or even benefit" to the party requesting the information.[164] The court found the invasion of the homeowners' privacy to be minimal and allowed disclosure.[165]

Under the *Robles* decision, the availability of this exemption is determined by a unilateral examination of the extent of the diminution of individual privacy. In order to determine the degree of diminution, one commentator has urged that the courts utilize the traditional tort definition of an invasion of privacy: if disclosure would offend the ordinary sensibilities of a reasonable man then it should not be permitted.[166] By utilizing this test, the courts could determine the availability of the exemption without engaging in the often perplexing task of isolating the applicant's motives for requesting inspection or the public purposes to be served by disclosure.

Given the choice between the *Getman-Wine Hobby* and *Robles* approaches, it would seem that the latter is preferable in light of the fact that it is consistent with the policy of promoting nonselective disclosure. The *Robles* analysis recognizes that the legislature has already balanced the competing interests and determined that *some* personnel, medical, and similar files should not be disclosed to the public due to considerations of individual privacy. The second clause of subsection 6254(c)

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162. *Cf.* Robles v. EPA, 484 F.2d 843, 847 (4th Cir. 1973); Bannercraft Clothing Co. v. Renegotiation Bd., 466 F.2d 345, 352, n.6, *rev'd on other grounds*, 415 U.S. 1 (1974); Sterling Drug, Inc. v. FTC, 450 F.2d 698, 705 (D.C. Cir. 1971); K. DAVIS, *supra* note 36, §3A.4, at 120 (1970 Supp.).

163. 484 F.2d 843 (4th Cir. 1973).

164. *Id.* at 848.

165. *Id.*

166. Comment, *Invasion of Privacy and the Freedom of Information Act: Getman v. NLRB*, 40 GEO. WASH. L. REV. 527, 539-40 (1971).

thus operates as a *specific limitation* on the public's right to inspect by directing the courts to refuse disclosure if they objectively determine that the invasion of individual privacy is unwarranted.

### 5. *Financial or Commercial Information Received in Confidence*

Three subsections of Government Code Section 6254 create exemptions for various records containing information of a financial or commercial nature. Although there might be other exemptions which imply that information must be confidential,[167] these subsections specifically require that the information actually be received in confidence. Subsection (d) protects information that is disclosed in confidence to state agencies responsible for the regulation or supervision of securities issues or of financial institutions. Subsection (e) exempts "[g]eological and geophysical data, plant production data and similar information relating to utility systems development, or market or crop reports, which are obtained in confidence from any person." Subsection (i) covers information required from a *local* taxpayer, which is received in confidence, that would result in a competitive disadvantage if disclosed. The language of these exemptions is basically self-explanatory. Their common denominator is that all require exempt information to be received in confidence from a source outside the government.

To date, there has been no California case law defining the phrase "received in confidence" as it is used in the Records Act. However, a brief summary of the federal case law interpreting the more generally-worded FOIA exemption for confidential information[168] may be helpful.[169]

Under the federal decisions, confidential information of a financial or commercial nature is that "which would customarily not be released to the public by the person from whom it was obtained."[170] These cases have found that the exemption serves the two-fold purpose of maintaining governmental efficiency and protecting the financial privacy of the individual.[171] Accordingly, information will be considered confidential if its disclosure is likely to have the effect of either impairing the government's ability to obtain necessary information in the future or

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167. *See* CAL. GOV'T CODE §6254(n).
168. 5 U.S.C. §552(b)(4) (1967).
169. For a detailed discussion, see Note, *Public Disclosure of Confidential Business Information Under the Freedom of Information Act: Toward a More Objective Standard*, 60 CORNELL L. REV. 109 (1974), criticizing the federal approach.
170. Petkas v. Staats, 501 F.2d 887, 889 (D.C. Cir. 1974); Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971).
171. Petkas v. Staats, 501 F.2d 887, 889 (D.C. Cir. 1974); M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 471 (D.D.C. 1972).

causing substantial harm to the competitive position of the person from whom the information was obtained.[172] The fact that the information has been elicited under a promise of secrecy may be given some weight, but is not a controlling factor.[173]

It should be noted that the agency will be able to claim a privilege under Evidence Code Section 1040 in most instances where these types of exemptive provisions are involved.[174] It is also conceivable that certain types of financial and commercial information could come under the exemption for "similar files" contained in Government Code Subsection 6254(c) if they are of a highly personal nature,[175] notwithstanding the fact that the information would not be exempt under one of the subsections enumerated above.

6. *Preliminary Drafts and Internal Memoranda*

Subsection 6254(a) creates an exemption for "[p]reliminary drafts, notes, or interagency or intra-agency memoranda which are *not retained* by the public agency in the ordinary course of business, provided that the public interest in withholding such records *clearly outweighs* the public interest in disclosure."[176] The language of this exemption seems to be susceptible to more than one reasonable interpretation, and thus it may be helpful to examine some of the policy considerations which may have influenced the legislature to draft an exemption of this nature.

Subsection 6254(a) may reflect the widely-followed common law view that only writings which represent ultimate official action should be regarded as "public records" subject to inspection.[177] On the other hand, federal cases interpreting a comparable FOIA provision have offered other justifications for the existence of such an exemption. These cases have pointed out that the exemption is apparently designed to insure that all policy perspectives will be voiced by protecting the confidentiality of an agency's deliberative and consultative processes.[178] As a collateral effect, it also eliminates the possibility that the public will be misled by exposure to discourse among officials preliminary to the final deter-

172. Pac. Architects & Eng. Inc. v. Renegotiation Bd., 505 F.2d 383, 384 (D.C. Cir. 1974); Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974); Sears, Roebuck & Co. v. GSA, 384 F. Supp. 996, 1005 (D.D.C. 1974).

173. Robles v. EPA, 484 F.2d 843, 846 (4th Cir. 1973); Nat'l Parks & Conservation Ass'n v. Morton, 351 F. Supp. 404, 407 (D.D.C. 1972), *rev'd on other grounds*, 498 F.2d 765 (D.C. Cir. 1974).

174. See text accompanying notes 99-100 *supra*.

175. See text accompanying note 153 *supra*.

176. CAL. GOV'T CODE §6254(a) (emphasis added).

177. For an extensive critique of this common law policy, see MacEwan v. Holm, 226 Ore. 27, 359 P.2d 413 (1961).

178. *Cf.* EPA v. Mink, 410 U.S. 73, 87-90 (1973); Schwartz v. IRS, 511 F.2d 1303, 1305 (D.C. Cir. 1975) [interpreting 5 U.S.C. § 552(b)(5) (1967)].

mination of agency policy.[179] Hence, officials will be judged by the final decisions, not by matters they considered in reaching that decision.

Unfortunately, there are no California appellate decisions which have interpreted subsection 6254(a). Hence, until this provision is authoritatively construed, one must rely on accepted rules of statutory construction and on common sense to determine the legislative intent behind subsection 6254(a). Due to the nature of the exemption, it would seem that "preliminary" is meant to modify "draft," "notes," and "interagency of intra-agency memoranda."[180] In addition, it seems clear that the balancing test imposed by subsection 6254(a) is also meant to apply to "preliminary drafts, notes, or interagency or intra-agency memoranda." On the other hand, due to the placement of the punctuation, it appears that the phrase "not retained . . . in the ordinary course of business" applies *only* to "interagency or intra-agency memoranda."[181] Although reasonable men may differ as to the above construction, this comment's analysis of subsection 6254(a) proceeds on the assumption that the latter construction will ultimately be accepted by the California judiciary. Regardless of the legislature's intended interrelationships of the various parts of subsection 6254(a), however, the purview of this exemption will ultimately depend on the interpretation of the terms "preliminary," "interagency or intra-agency memoranda," and "not retained . . . in the ordinary course of business," and upon the function of the balancing test which has been superimposed upon the entire provision.

The federal courts distinguish between "decisional" memoranda, which are not exempt from disclosure, and "pre-decisional" memoran-

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179. *Cf.* Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 482 F.2d 710, 718 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 168 (1975).

180. It could be argued that "preliminary" is meant to modify only "drafts." This conclusion could be reached by noting the use of the disjunctive "or" between "notes" and "interagency or intra-agency memoranda," possibly indicating that "preliminary" was not meant to modify such memoranda. If this is the effect of the word "or," then it would seem "preliminary" would not modify "notes" either. If such a result were desired, subsection 6254(a) should be: "Preliminary drafts *and* notes, *or* interagency or intra-agency memoranda . . . ."

181. "In general, working papers are not available unless they are retained for future reference." ASSEMBLY INFORMATION COMMITTEE, *supra* note 6, at 9. This statement seems to indicate that the Committee feels that the term "not retained . . . in the ordinary course of business" is intended to modify "preliminary drafts, notes, or interagency or intra-agency memoranda." This conclusion may coincide with the legislative intent, but it is not warranted by the puncuation structure of subsection 6254(a). The phrase "not retained . . . in the ordinary course of business" appears in the same clause as "interagency or intra-agency memoranda." If "not retained . . . in the ordinary course of business" is meant to modify all of the preceeding terms then a *comma* should be inserted between "memoranda" and "which." It should be noted that the legislature did place a *comma* between "business" and "provided," indicating that the balancing test would apply to all the preceeding terms, and not just to "interagency or intra-agency memoranda."

da, which are exempt from disclosure.[182] "Decisional" memoranda are documents which reflect policy already made and announced by the agency. "Pre-decisional" memoranda are composed exclusively for purposes of assisting policy formulation.[183] Under this criteria the critical factor in determining the status of a document is whether it is representative of the agency's final decision.[184] So long as the document is representative of the final decision it will be available for public inspection, even though it was one of the first documents drafted by the agency during its decision-making process and even though the final decision contains substantially the same information.[185]

It may be argued that "preliminary," as used in subsection 6254(a), is analogous to the federal "pre-decisional" documents. Under this interpretation, preliminary drafts would be comprised of proposals which were considered by agency officials during the course of their deliberations but would not reflect the final decision. On the other hand, it is possible that the legislature intended to use "preliminary" in its chronological sense. However, this interpretation would conditionally exempt every draft except the one which is the embodiment of the agency's final decision. Since it might often be necessary to examine the information upon which a decision is based in order to ascertain its import, and since the primary purpose of the exemption is probably that of promoting full and free discussion among public officials during their deliberations, this interpretation would seem undesirable. The public's right to know the information upon which the agency formulated its decision would be severely abridged while the government's interest in protecting the integrity of its deliberative processes could be accomplished by exempting only those records which do not contain information incorporated into the final decision. Therefore, it would seem that the proper accomodation between the "right to know" and efficient agency administration could be accomplished by interpreting "preliminary drafts" as being synonymous with the federal "pre-decisional" memoranda.

Another source of uncertainty under subsection 6254(a) lies in the meaning of the terms "interagency" and "intra-agency." Presumably, an

182. *See, e.g.*, Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 482 F.2d 710, 719 (D.C. Cir. 1973); *see* Note, *The Freedom of Information Act and the Exemption For Intra-Agency Memoranda*, 86 HARV. L. REV. 1047, 1057-63 (1973).

183. Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 482 F.2d 710, 719 (D.C. Cir. 1973).

184. The document must also be deliberative, rather than largely a statement of facts, in order to be exempt; *see, e.g.*, EPA v. Mink, 410 U.S. 73, 87-88 (1973); Montrose Chemical Corp. v. Train, 491 F.2d 63, 66 (D.C. Cir. 1974).

185. Fisher v. Renegotiation Bd., 473 F.2d 109, 115 (D.C. Cir. 1972). *See* Schwartz v. IRS, 511 F.2d 1303, 1305-06 (D.C. Cir. 1975).

"agency" for purposes of this subsection means one that is covered by the Records Act under section 6252. If this is the case, then both the receiving and the sending agency must be a state or local agency as defined by the Act in order for a memorandum to be classified as "interagency." Therefore, it would appear that memoranda passed between an agency and members of the legislature, which is not an "agency" under the Act, would not be exempt under subsection 6254(a).[186] However, even if both the receiving and sending entities are agencies within the meaning of section 6252, the memoranda may still not be exempt. There is federal authority holding that interagency memoranda do not automatically become exempt merely because they are customarily passed from agency to agency; the involved agencies must mave a legitimate purpose for exchanging such memoranda.[187]

The federal judiciary has also held that a document may originate outside the agency and still be considered an "intra-agency" document if certain factors are present. In *Wu v. National Endowment for Humanities*,[188] the court extended the exemption for intra-agency documents to include the memoranda of uncompensated consultants who had advised the agency to reject the plaintiff's request for an endowment. A later case clarified the holding in *Wu* by indicating that not all consultants who advise an agency would qualify under this exemption;[189] outside consultants must become the functional equivalent of the agency by making decisions for the government in order for the exemption to be operative.[190] Therefore, under the federal analysis, documents can still be classified as "intra-agency" when the originator is an outside agent of the agency; the document need not be created within the confines of the agency's office by agency personnel.

In order for interagency and intra-agency memoranda to be exempt, subsection 6254(a) requires that they must not be retained by the agency in its ordinary course of business. Thus, the interpretation of "not retained . . . in the ordinary course of business" would seem to be the key to determining the scope of the exemption for these memoranda. Since subsection 6254(a) is probably designed to protect the agency's deliberative processes, common sense would dictate that documents which are "not retained" would be those which the agency will dispose of once there has been a final disposition of the matter at hand.

186. *Cf.* K. DAVIS, *supra* note 36, §3A.21, at 156.
187. Bristol-Myers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir. 1970).
188. 460 F.2d 1030 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1972).
189. Washington Research Project, Inc. v. Dept. of HEW, 504 F.2d 238, 247-48 (D.C. Cir. 1974).
190. *Id.*

However, a question arises as to the length of time an agency may keep these materials before they will be considered to have been *retained* in the ordinary course of business. It would seem that an agency should not be able to preserve materials for the benefit of future planners while simultaneously maintaining an exemption for the documents. Therefore, it could be argued that once there is no longer an immediate need for such material in the decision-making process the agency must either dispose of it or make it available to the public.

Unlike most of the other subsections of Government Code Section 6254, the application of subsection 6254(a) is made conditional by the imposition of a balancing test. Hence, in order to keep its preliminary documents from being revealed to the public the agency must demonstrate that the public interest in nondisclosure *clearly* outweighs the public interest in disclosure.[191] Obviously, due to the identical language of the two provisions, subsection 6254(a) requires a balancing of the same public interests as required by Government Code Section 6255.[192] A question arises, however, as to whether the legislature intended that the public interest in disclosure be balanced against the general public interest in nondisclosure, or whether the focus should sharpen upon the reasons for not disclosing the particular record being requested. Arguably the examination should focus on the individual record since the interest in nondisclosure of preliminary documents may vary from document to document. If an individual focus were not required then it would seem pointless to have included a balancing test in the first place—the general public interest in nondisclosure would either demand that all preliminary documents be exempt or that all be non-exempt. Since the legislature obviously felt that at least some preliminary documents should not be disclosed, it would appear that the balancing test must be applied on a case-by-case basis. Therefore, it would seem that the agency must demonstrate in each case that disclosure of the particular preliminary record in question would seriously interfere with the legitimate public need for a well-reasoned decision-making process within and among the state and local agencies.

7. *Miscellaneous Exemptions*

Government Code Section 6254 also contains several exemptions of relatively minor importance that will be encountered only in a limited number of situations. Subsection (g) creates an exemption for various data relating to licensing, employment, or academic examinations. This

191. CAL. GOV'T CODE §6254(a).
192. See text accompanying notes 73-93 *supra*.

exemption is designed to prevent future examinees from gaining access to test questions, scoring keys, and other materials.[193] Completed examination papers may be made available at the discretion of the public official in custody of them.[194] Subsection (h) conditionally exempts the contents of real estate appraisals, feasibility studies, and other evaluations made for the state in relation to the acquisition of property or other contractual agreements. Once any such acquisition or agreement is consummated, the aforementioned records are subject to public inspection.[195] Thus, subsection (h) places the government in legal parity with private individuals insofar as the power to contract and acquire property is concerned. Subsection (j) protects certain reference materials in a public agency's library. For example, the legal library of the Attorney General is not open to the public on a regular basis.[196] However, this exemption protects only museum and reference materials used solely for exhibition or reference purposes. Finally, subsection (n) exempts "[s]tatements of personal worth or personal financial data required by a licensing agency and filed by an applicant with such licensing agency to establish his personal qualification for the license, certificate, or permit applied for."

### *C. Disclosure Resulting in Waiver of an Exemption*

The exemptions delineated in Government Code sections 6254 and 6255 protect certain records from *required* disclosure; they do not prohibit disclosure. Consequently, in the absence of an express statutory prohibition, the agencies are vested with the power to disclose exempt records if they so desire.[197] In *Black Panther Party v. Kehoe*[198] the court held, however, that once an exempt record has been disclosed to a member of the public it loses its exempt status and the agency cannot thereafter refuse anyone access to that particular record.[199] In *Kehoe*, the plaintiffs sought disclosure of citizens' complaints concerning licensees of the Bureau of Collection and Investigative Services. The Bureau had given copies of these complaints to the licensees in order to encourage voluntary correction of violations. The court ruled that this

193. ASSEMBLY INFORMATION COMMITTEE, *supra* note 6, at 10.
194. *Id.*
195. Government Code Subsection 6254(h) also provides that the laws of eminent domain are not to be affected. Under the laws of eminent domain, the purchase price or consideration becomes public information *after* acquisition of the property. CAL. GOV'T CODE §7275, *added by*, CAL. STATS. 1975, c. 1240, § 27, at —.
196. ASSEMBLY INFORMATION COMMITTEE, *supra* note 6, at 11.
197. "Nothing in this section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law." CAL. GOV'T CODE §6254.
198. 42 Cal. App. 3d 645, 117 Cal. Rptr. 106 (1974).
199. *Id.* at 656-57, 117 Cal. Rptr. at 113.

practice of selective disclosure constituted a waiver of the exemption and therefore the records had to be made available to the public.[200] The court indicated, however, that the Bureau could have preserved the exemption by informing the licensees of the *nature* of the complaints without physical delivery of the documents.[201]

The *Kehoe* court did not state whether there are any exceptions to the rule prohibiting selective disclosure. There are, however, three possible situations in which the courts may find exceptions to this rule: first, where the subject of a file wishes to inspect the record in order to examine its veracity; second, where the agency has disclosed the exempt record to another agency; and third, where the exempt record has been disclosed pursuant to a discovery order.

In light of the Act's failure to specifically authorize an examination of individual needs for disclosure, it follows that the request of a person seeking access to records containing information about himself will be denied if the record in question is exempt from disclosure.[202] Therefore, in the absence of a legislative enactment to allow this procedure, it would seem that a judicial exception to the *Kehoe* rule would be contrary to the Act's basic policy of nonselective disclosure. An analogous situation arises when an agency in possession of an exempt record discloses the information to another agency. It is probable that not all communications between the agencies will be considered "interagency" memoranda so as to be exempt under Government Code Section 6254(a). This result could obtain either because the document is retained by the agency or because the recipient-agency does not have a sufficient business interest in the record to fall within the purview of that subsection.[203] Irrespective of subsection 6254(a), it could be argued that the public's need for efficient interagency cooperation and interaction justifies liberalization of the *Kehoe* rule to permit nondisclosure of records which have been transferred from one agency to another so long as the record was originally exempted from disclosure and was received in confidence by an agency which had an official interest in its content.[204]

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200. *Id.*
201. *Id.* at 658, 117 Cal. Rptr. at 114.
202. *See* Younger v. Berkeley City Council, 45 Cal. App. 3d 825, 833, 119 Cal. Rptr. 830, 834-35 (1975), holding that Government Code Section 6254(f) precluded the Berkeley City Council from giving individuals the right to see their state arrest records in order to examine their veracity.
203. See text accompanying notes 186-191 *supra.*
204. *See* Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578, 582 (D.C. Cir. 1970); Comment, *Interagency Information Sharing: A Legal Vacuum,* 9

A third situation which may justify an exception to the nonselective disclosure rule arises when an exempt document is "discovered" by a private litigant. On the basis of *Kehoe* the argument could be made that this document should be made available for public inspection. On the other hand, it may be asserted that a distinction can be drawn between this situation and the facts of *Kehoe*. In *Kehoe* the agency waived the exemption by *voluntarily* disclosing the records. In contrast, when a record is discovered, it could be argued that there is no waiver of the exemption because the disclosure was *involuntary* in that it was judicially ordered.[205]

## THE ROLE OF THE JUDICIARY

### *A. Judicial Remedies*

If an individual believes that an agency is wrongfully withholding public records, he may seek to compel disclosure of the record by initiating injunctive or declaratory proceedings in the superior court of the county in which the record was created or kept confidential.[206] The time for responsive pleadings and hearings are set by the court "with the object of securing a decision . . . at the earliest possible time."[207] If there is a prima facie showing that the requested records are (1) public, and (2) being *improperly* withheld by the agency, then the court shall order the custodian to "disclose the public record or to show good cause why he should not do so."[208] In determining whether the record should be disclosed the court is, under certain circumstances, empowered to examine the document *in camera*.[209] If the records are not found to be exempt pursuant to either Government Code Sections 6254 or 6255 the court will order the records to be disclosed. In addition, the Act has recently been amended to provide for the award of court costs and reasonable attorney's fees to the plaintiff who prevails in an action to compel disclosure of a public record. However, these costs and fees are the

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SANTA CLARA LAWYER 301, 306 (1969); *cf.* Coldwell v. Bd. of Pub. Works, 187 Cal. 510, 521, 202 P. 879, 884 (1921).

205. *But see* Markwell v. Sykes, 173 Cal. App. 2d 642, 649-50, 343 P.2d 769, 773-74 (1959) (privilege not to disclose record was permanently waived by official who did not pursue any of the remedies open to him to challenge the trial court's decision that the privilege did not apply).

206. CAL. GOV'T CODE §§6258, 6259.

207. CAL. GOV'T CODE §6258.

208. CAL. GOV'T CODE §6259.

209. Under Government Code Section 6259 the court may examine the record *in camera* if permitted by Evidence Code Section 915(b). Evidence Code Section 915(b) allows an *in camera* inspection only if the court is ruling on a claim of privilege pursuant to Evidence Code Section 1040 (official information), Evidence Code Section 1041 (identity of informer), or Evidence Code Section 1060 (trade secrets).

liability of the public agency only, and not of the public official personally.[210]

### *B. Exhaustion of Administrative Remedies*

Although the Act explicitly provides for judicial remedies by which an individual may enforce his right to inspect public records, there is some question as to whether an individual must exhaust any available administrative remedies before he seeks judicial relief.[211] Government Code Section 6253, subsection (a) authorizes state and local agencies to adopt regulations governing *inspection* procedures. Implicitly, this provision also allows the agencies to formulate administrative appellate procedures by which an individual may seek review of an agency's determination that a requested record is exempt. One state agency, the California Public Utilities Commission, has devised such procedures.[212] The PUC regulations provide that an applicant who has been denied access to a record may appeal that decision before the full Commission in San Francisco.[213] However, under this procedure, a party seeking review will have to travel to San Francisco in order to appear before the full Commission. In addition, there are PUC regulations which may make it more difficult for an individual to present an effective and inexpensive appeal.[214]

In California the general rule is that any available administrative remedies must be exhausted before applying to the courts for relief.[215] The courts will stay administrative proceedings and hear the case only when the plaintiff can show he will suffer an irreparable injury[216] or that his administrative remedies are inadequate or unavailable.[217] Therefore, under the general California rule, it would seem that an individual must comply with administrative procedures such as those adopted by the

210. CAL. GOV'T CODE §6259, *as amended*, CAL. STATS. 1975, c. 1246, §9, at —.

211. The FOIA generally requires a plaintiff to exhaust his available administrative remedies before resorting to the courts for relief. 5 U.S.C. §552. *See* Renegotiation Bd. v. Bannercraft Clothing Co., Inc., 415 U.S. 1, 20-23 (1974); Sterling Drug, Inc. v. FTC, 450 F.2d 698, 710 (D.C. Cir. 1971).

212. PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Gen. Order No. 66-C (June 25, 1975).

213. *Id.* §3.4 at 5.

214. *Id.* §4.1 at 6 (subpoena demanding original records or personal appearance of the record's custodian is an unwarranted interference with the Commission's performance of its official duties and will be resisted); *id.* § 4.2 at 6 (compensation for Commission employees who are directed by subpoena to give expert testimony); CAL. PUB. UTIL. CODE §1759 (only the supreme court has jurisdiction to review, reverse, correct, or annul any order or decision of the Commission).

215. *E.g.*, Temescal Water Co. v. Dept. of Pub. Works, 44 Cal. 2d 90, 280 P.2d 1 (1955); Abelleira v. Dist. Ct. of Appeals, 17 Cal. 2d 280, 109 P.2d 942 (1941).

216. *E.g.*, Hesperia Land Dev. Co. v. Super. Ct., 184 Cal. App. 2d 865, 7 Cal. Rptr. 815 (1969).

217. *E.g.*, Martino v. Concord Community Hosp. Dist., 233 Cal. App. 2d 51, 43 Cal. Rptr. 255 (1965).

Public Utilities Commission, even though they may be lengthy and expensive.

There is, however, a judicially-created exception to this general rule that could possibly apply to the Records Act. In *Scripps Memorial Hospital, Inc. v. California Employment Commission*,[218] the California Supreme Court was presented with an act containing remedial provisions very similar to those of the Records Act: both acts authorized, but did not require, the adoption of administrative procedures, and both acts unequivocally created a judicial remedy. The *Scripps* court held that the California Unemployment Insurance Act[219] did not require the exhaustion of administrative remedies, even though the Employment Commission had exercised its statutory authority by adopting such procedures.[220] The court stated that these remedies were neither exclusive nor mandatory because the Unemployment Insurance Act had expressly provided a judicial remedy without qualification.[221] The court further held that even if the act could be construed as requiring the establishment of administrative remedies, such remedies would only be an alternative to the expressly provided judicial remedy[222] and, therefore, an individual could elect between pursuing his administrative or judicial remedies.[223]

It is contended that the *Scripps* analysis of the Unemployment Insurance Act is applicable to the Records Act. First, as previously noted, Government Code Section 6253(a) authorizes the agencies to develop *inspection* procedures, but does not direct the establishment of appellate procedures. Therefore, as under the Unemployment Insurance Act, the agencies have discretion to adopt these procedures but are not required to do so. Secondly, Government Code Sections 6258 and 6259 contain no indication that administrative remedies must be exhausted before resorting to the courts. Section 6258 provides, in part: "Any person may institute proceedings for injunctive or declarative relief in any court of competent jurisdiction to enforce his right to inspect or to receive a copy of any public record or class of public records . . . ."[224] Thus, as in the *Scripps* case, the Records Act provides for judicial remedies without any qualifications as to the availability of administrative remedies.

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218. 24 Cal. 2d 669, 673-74, 151 P.2d 109, 112 (1944).
219. *As amended*, CAL. STATS. 1935, c. 352; CAL. STATS. 1939, c. 628, 630.
220. 24 Cal. 2d 669, 674, 151 P.2d 109, 112 (1944).
221. *Id.*
222. *Id.*
223. However, if an individual *elects* to pursue his administrative remedies then he must exhaust them. City of Susanville v. Leo C. Hess Co., 45 Cal. 2d 684, 689, 290 P.2d 520, 523 (1955).
224. CAL. GOV'T CODE §6258.

In light of these factors, it seems unlikely that the legislature intended to impose upon the individual who is denied access to public records the burden of having to exhaust his available administrative remedies. Therefore, once an individual is initially refused access to a record by an agency official it would appear that he can apply to the courts for relief if he believes that the record is not exempt under the Act.

### *C. Editing*

A second question which arises under the Records Act relates to the power of the courts to order an agency to "edit" public records. Although there are no express provisions in the Records Act authorizing this practice,[225] some of the federal courts have intepreted the FOIA to allow the courts to order agencies to "edit" out exempt material from a record and disclose the non-exempt portions.[226] In this way the policy of maximum disclosure is preserved by permitting an individual to inspect the substance of a document that would otherwise be exempt. One commentator has criticized this editing practice because it places a considerable burden on agency personnel.[227] In order to edit a record properly, a public servant would have to have a comprehensive knowledge of the disclosure laws. Thus, by virtue of this requirement, the ministerial task of disclosing or refusing to disclose a public record may be transformed into the complex task of ascertaining which material within a particular record falls within an exemption and of excising that material. As a result, higher-level agency officials may often be required to edit the documents that lower-level employees are incompetent to handle.[228]

Obviously, this practice has both positive and negative aspects. On the one hand, it promotes the public's right to know by providing for maximum disclosure of non-exempt material. On the other hand, administrative efficiency may be sacrificed if the agencies are forced to devote an inordinate amount of time and manpower to a task that

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225. There is authority in California that the trial court may edit documents where appropriate. *In re* Waltrues, 62 Cal. 2d 218, 223-24, 397 P.2d 1001, 1004, 42 Cal. Rptr. 9, 12 (1965); Terzian v. Super. Ct., 10 Cal. App. 3d 286, 297, 88 Cal. Rptr. 806, 814-15 (1970).

226. *See, e.g.*, Sterling Drug, Inc. v. FTC, 450 F.2d 698, 704 (D.C. Cir. 1971); Bristol-Myers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir. 1970); *see* Comment, *The "Investigatory Files" Exemption to the Freedom of Information Act*, 1974 WASH. U.L.Q. 463, 470 & n.40 (1974) (cases cited in n.40). In addition, 5 U.S.C. §552(b) of the FOIA has been amended to require that "any reasonable segregable portion" of a record be disclosed after exempt portions are deleted. 88 STATS. 1564 (1975).

227. Koch, *The Freedom of Information Act: Suggestions For Making Information Available to the Public*, 32 MD. L. REV. 189 (1972) (Koch is an attorney in the Office of the General Council, Federal Trade Commission).

228. *See* Koch, *The Freedom of Information Act: Suggestions For Making Information Available to the Public*, 32 MD. L. REV. 189, 203-05, 213 (1972); Bristol-Myers Co. v. FTC, 284 F. Supp. 745, 747 (D.D.C. 1968), *modified*, 424 F.2d 935 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 824 (1970).

should be essentially ministerial in nature. Therefore, if the Records Act should be amended to allow for this practice, or if the courts should take it upon themselves to institute such a procedure, it would seem that the agencies should only be required to edit documents that, for the most part, contain non-exempt material. Documents that contain a substantial amount of exempt information should be entirely exempt in order to prevent editing from becoming a burdensome task.

## CONCLUSION

The California Public Records Act is an important step forward in the direction of providing the citizenry with the information it must have in order to intelligently oversee the bureaucracy which serves it. Although the Act has not completely removed the barriers which prevent public disclosure of governmental information, it has clarified the scope of the public's right to inspect by eliminating any conditions based upon the character or qualifications of the party seeking access and by enacting several discrete exemptions. On the other hand, while the Act has attempted to clarify the public's right of access, some of its exemptive provisions contain language which creates uncertainties as to their intended scope and operation. Until the judiciary has explicitly and consistently construed these ambiguous provisions, the ultimate goal of the Records Act will remain unfulfilled. Hopefully, the analysis presented here will provide some aid to the public, the agencies, and the courts in determining the ultimate extent of the public's right of access to public records.

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